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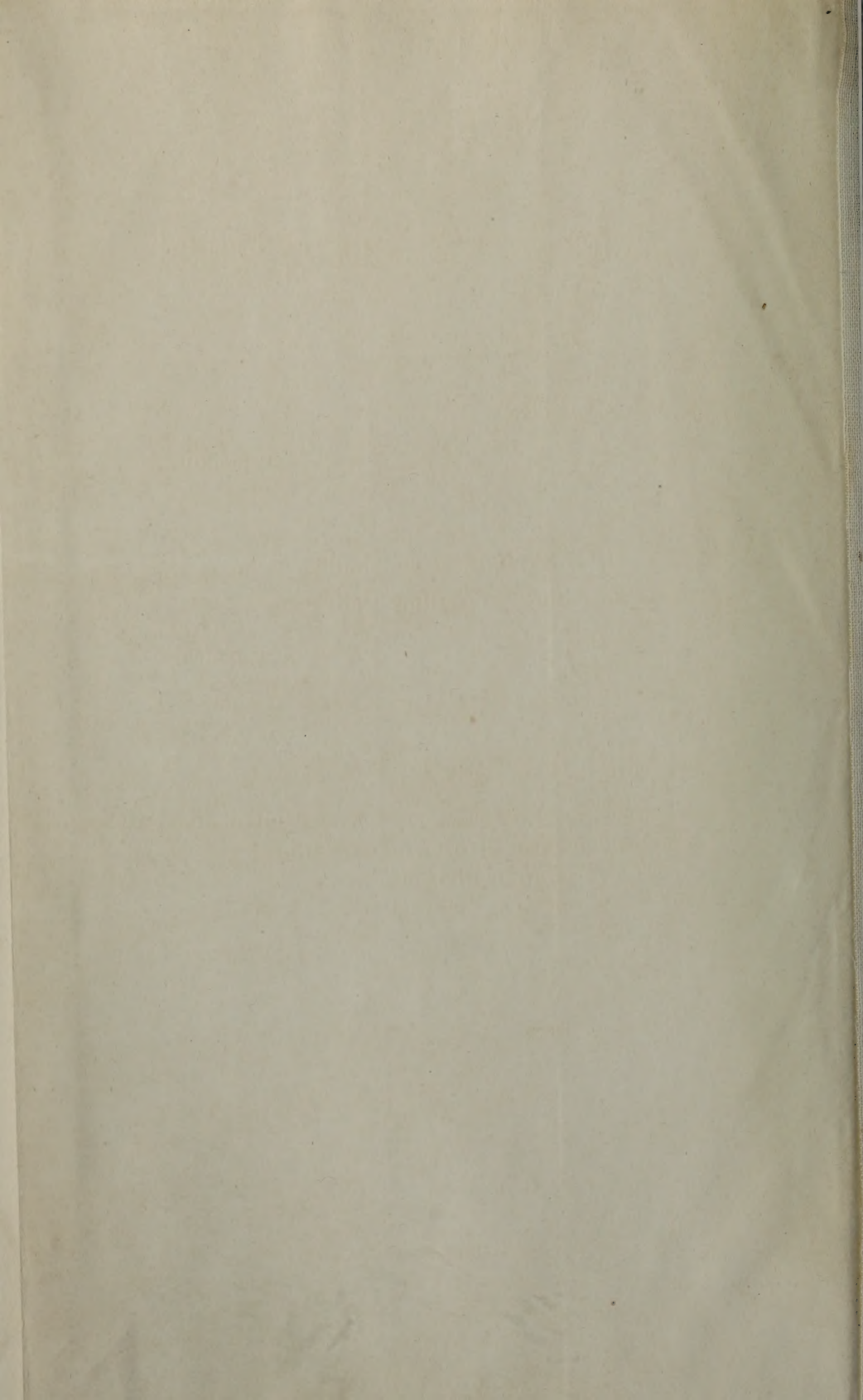
## EXTRACT FROM BY-LAWS

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2-1-1





2398

No. 10765

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

NELSON B. CRAMER,

Appellant,

vs.

COL. JESSE G. FRANCE, Commanding Officer, Reception Center, Fort McArthur, California,

Appellee,

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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**FILED**

JUN 21 1944

PAUL P. O'BRIEN.  
CLERK

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**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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No. 1072

# United States Court of Appeals

for the Second Circuit

WILLIAM B. EMMETT

Appellant

vs.

THE UNITED STATES OF AMERICA

Appellee

## STATEMENT OF FACTS

That Appellant was the Director General of the United States Customs Service from 1910 to 1912, and during that time he was in the possession of certain confidential information relating to the operations of the Customs Service.

## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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Los Angeles 12, Calif.



In the District Court of the United States  
Southern District of California  
Central Division

No. 3319 RJ

In the Matter of the Petition of

NELSON B. CRAMER,  
for a Writ of Habeas Corpus.

AMENDED PETITION FOR WRIT OF HABEAS  
CORPUS.

*To the Honorable Judges of the District Court of the  
United States, Southern District of California,  
Central Division:*

Comes now Nelson B. Cramer and files this amended petition for a writ of habeas corpus on his own behalf, and respectfully shows to the Court as follows:

I.

Petitioner is unlawfully detained and restrained of his liberty by Col. Jesse J. France, Commanding Officer, Reception Center, Fort MacArthur, California, by virtue of his induction into the armed forces of the United States pursuant to his reclassification in Class I-A and order to report for induction by the Selective Service Local Board No. 271 for the County of Los Angeles, State of California, purporting to act pursuant to the Selective Service and Training Act of 1940, as amended, and the Rules and Regulations prescribed by the President to carry out the provisions of said Act, by an order issued by order of Lt. Col. A. H. Bailey, District Recruiting and Induction

Officer, Los Angeles Armed Forces Induction Station No. 1, California, to petitioner under date of December 2, 1943, a copy of which order is attached hereto and prayed to be read as a part hereof.

Said induction is void and said restraining unlawful and without authority in that said reclassification and order to report for induction are void for the following grounds and by reason of the facts as herein set forth:

## II.

This petition is based upon the following grounds:

1. Said order of induction is void and illegal in that it was made in violation of section 5, subdivision (k), Selective Service and Training Act (added Nov. 13, 1942, 50 U. S. C. A., Tit. War, Appdx. sec. 305).

2. The reclassification of petitioner in Class I-A instead of in Class II-C and said order of induction are not founded on and not supported by *an* substantial and competent evidence.

3. The reclassification of petitioner in Class I-A instead of in Class II-C and the order of induction were made and issued by said Local Board as the result of an arbitrary, unfair, and capricious enforcement and administration of said Act, in that: (a) there is no substantial and competent evidence before the Board to support said reclassification and order; (b) said reclassification and order were made in disregard of all the evidence submitted by petitioner to said Board in support of his application to be again classified in Class II-C; (c) petitioner was not accorded a full and fair hearing before said Board; (d) said reclassification in Class I-A was based in part upon matters appearing in the record which petitioner was not



given an opportunity to rebut; and (e) said reclassification and order for induction were approved by Col. Kenneth H. Leitch, State Director of Selective Service, acting in an arbitrary, unfair, and capricious manner in the enforcement and administration of said Act.

4. In reclassifying petitioner in Class I-A instead of in Class II-C, and in issuing said order of induction, said Local Board abused its discretion and exceeded its authority in the particulars immediately hereinabove set forth in subparagraph 3 of this paragraph II.

5. By said classification in Class I-A instead of in Class II-C, and by said order of induction, petitioner has been and is denied due process of law as guaranteed him by the 5th Amendment of the Constitution.

### III.

This petition is based upon the following facts:

1. As required by the provisions of said Act, petitioner presented himself and submitted to registration on a day fixed by law for said purpose, being at that time temporarily residing within the jurisdiction of said Local Board No. 271 which is composed of W. F. Prisk, Chairman, Clarence Wagner, Fred O'Brien, Jack Horner and A. L. McArthur. He is now a registrant within the jurisdiction of said Local Board No. 271, having Order Number 1915 in the files and records thereof. In 1942 said Local Board No. 271, upon consideration of the evidence before it, classified petitioner in Class II-C, as being a necessary man in an agricultural pursuit, namely, as a person engaged in farming on his own property in the State of South Dakota, and was accordingly deferred from training and service.

2. At all times herein set forth petitioner has been and now is necessary to and prior to his induction was regularly engaged in an agricultural occupation and endeavor essential to the war effort within the meaning of section 5, subdivision (k), of the Selective Service and Training Act of 1940, as amended, in that at all such times he has been and now is personally necessary to and prior to his induction was regularly engaged in farming approximately 650 acres owned by him near Corsica, in the State of South Dakota, and he can obtain no satisfactory replacement for his own services on said farm. Except as required to be in Long Beach, California, by the orders of the defendant Board with reference to his reclassification and with reference to the protection of his rights with respect thereto, and in obedience to said order of induction, petitioner has not left such occupation and endeavor during the year last past.

3. On or about July 15, 1943, said Board notified petitioner that it was about to reconsider his classification as required by law. Thereafter, on July 29, 1943, in accordance with said Act and the rules and regulations prescribed thereunder, petitioner submitted evidence and requested said Local Board No. 271 to again classify him in Class II-C and to again defer him from training and service under said Act. Notwithstanding said request and the evidence submitted by him in support thereof, said Local Board No. 271, on or about September 11, 1943, reclassified petitioner in Class I-A, as immediately available for military service, and petitioner was so advised.

4. On or about September 15, 1943, petitioner learned for the first time that between July 29, 1943 and September 11, 1943, said Local Board No. 271, through its chairman and its secretary, communicated with the United



States Department of Agriculture War Board at Armour, South Dakota, of which one Isaac C. de Velder was and is now chairman, and received a letter from said de Velder as such chairman, dated August 18, 1943, stating in part: "That at no time during the past two years has Mr. Cramer personally done any farm work whatever himself. That at no time has Mr. Cramer displayed any knowledge of farming which would qualify him to supervise the hired men doing the work on such farm." A copy of said letter is attached hereto and is prayed to be read as a part hereof.

5. On or about September 3, 1943, W. F. Prisk, Chairman of Local Board No. 271, addressed a letter to one Helen Clavier, then and now secretary of said Board, which reads in part as follows:

"I am returning to you the bulletin issued by the United States Department of Agriculture. Unless there is information in the affidavits to which you called attention over the phone a few minutes ago, it appears to me that the information given in Section 2 on the first page of the bulletin coupled with the letter from South Dakota Draft Board, makes it almost mandatory for our board to classify Mr. Cramer I-A. Particularly is this true when we read the checkmarked paragraph 2 on page 3 which specifies that war boards should be in a position to initiate requests for 2-C or 3-C classifications of registrants in agricultural occupations. Cramer's War Board apparently has no thought whatsoever of making any such suggestion in his behalf."

Petitioner is informed and believes and upon such information and belief alleges that in said letter of September 3,

1943, in referring to a letter from the South Dakota Draft Board, said Prisk intended to refer to the said letter from de Velder as Chairman of said Agriculture War Board dated August 18, 1943, and that the bulletin referred to by said Prisk is U. S. Department of Agriculture War Letter No. 310, Labor, No. 48, dated at Berkeley, California, March 20, 1943, of which the sections or paragraphs referred to by said defendant Prisk read as follows:

On Page 1:

"2. It is the responsibility of local draft boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification in II-C or III-C. Therefore, steps should be taken to work out a mutually agreeable arrangement for the handling of this procedure. It is suggested that each county war board contact local Selective Service Boards and, if possible, arrange a joint meeting to discuss matters of procedure and policy at the county level or local board level in connection with Selective Service Local Board Release No. 164-A".

On Page 3:

"(2) War Boards should also be in a position to initiate requests for the classification of agricultural registrants in II-C and III-C even though neither the registrant or his employer has requested deferment."

6. All the acts alleged in subparagraphs 4 and 5 of this paragraph III were done as therein alleged prior to

September 11, 1943, without the knowledge of petitioner, and petitioner was classified as I-A by said Local Board No. 271 on September 11, 1943, without being informed of said matters. Thereupon petitioner on September 17, 1943, requested an opportunity to appear in person before said Local Board No. 271 to (1) present new facts and evidence not considered by said Board on September 11, 1943, and (2) present evidence supporting his claim that false and misleading information had been placed in his file concerning him and to his detriment, to wit, the information contained in the said letter from said de Velder. On or about October 12, 1943, petitioner was permitted to and did appear personally before said Local Board No. 271, but was not afforded a full and complete opportunity to submit evidence on his own behalf because of the antagonistic and prejudicial attitude of a majority of the members of said Board. Thereupon said Local Board No. 271 made the following entries, among others, in its minutes of said meeting:

“Mr. Cramer was advised that the board was required to follow instructions laid down in a directive from the U. S. Department of Agriculture County War Board, dated March 20, 1943, which in part reads: ‘It is the responsibility of local boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification of II-C or III-C,’”

and that the County War Board in South Dakota had:

“advised in writing they did not believe Mr. Cramer was entitled to deferment,”



and thereupon, by a vote of three members of said Board, again reclassified petitioner in Class I-A and denied his request for deferment, two members voting against such reclassification.

7. On October 18, 1943, having been informed of the action of Local Board No. 271, on October 12, 1943, petitioner filed with said Board a Notice of Appeal and a Statement on Appeal, copies whereof respectively are attached hereto and prayed to be read as a part hereof. The record of petitioner before said Board was not immediately transmitted to the proper Appeal Board as required by law, but was transmitted on October 18, 1943, to one Maj. Frank G. Lyman, coordinator for Selective Service in Los Angeles County, "for a review of these records in accordance with telephone conversation of even day." On or about October 25, 1943, said record was referred to the Appeal Board and on or about October 29, 1943, said record was returned by the Appeal Board to said Local Board No. 271, "by direction of coordinator for inclusion of additional information" and return to the Appeal Board. Petitioner was without knowledge until on or about October 29, 1943, of the matters alleged in this subparagraph occurring subsequent to the filing of his said notice of appeal and did not know until December 1, 1943, what, if any, additional information was included in said record by direction of said coordinator.

8. On or about November 5, 1943, the Appeal Board reviewed said record and approved said reclassification of petitioner in Class I-A and forwarded said record to the State Director of Selective Service at Sacramento as required by law. On or about November 8, 1943, at the request of petitioner's attorney, said State Director stated

that the record would be returned without action by him to Local Board No. 271, to enable petitioner to submit to said Board certain additional evidence in support of his claim for deferment. Thereafter, notwithstanding the granting of said request on November 8, 1943, the State Director of Selective Service failed to so return said record to said Local Board and approved the action of Local Board No. 271, and acting on his instructions said Board notified petitioner on November 12, 1943, to report for induction on November 22, 1943.

9. As soon as it was possible to do so after October 12, 1943, Hon. M. Q. Sharpe, Governor of South Dakota, at the request of petitioner, directed the Administrator of the State Council of Defense of South Dakota to make an investigation and report on the agricultural operations and status of petitioner, and petitioner through his attorney informed the State Director of Selective Service of California of that fact on November 8, 1943, and informed said State Director that the report of this investigation constituted the additional evidence petitioner desired to file. At the direction of the National Director of Selective Service, the State Director of Selective Service thereupon made an order staying petitioner's induction to November 29, 1943. Said report, containing information therein material to the issue of plaintiff's right to an additional deferment as a necessary person engaged in a necessary agricultural pursuit, was filed with the State Director of Selective Service in Sacramento on or about November 26, 1943.

10. Petitioner alleges that the bulletin of the Department of Agriculture referred to in subparagraph 5 of this

paragraph contains, among others, the following provisions:

"6. Since War Boards have only the one job of obtaining needed agricultural production, it should not be their responsibility to report their opinions as to whether or not an individual may be a draft dodger. County war boards are to report the actual status of the individual engaged in agricultural work, outlining the agricultural production that this individual is responsible for. The final decision with regard to whether or not an individual shall be inducted into the armed services rests with the local draft board or the appeal board, as the case may be".

Petitioner further alleges that de Velder as the Chairman of the County War Board in South Dakota did not advise Local Board No. 271 in writing or otherwise that "they did not believe Mr. Cramer was entitled to deferment", as recited in the minutes of Local Board No. 271 for October 12, 1943. Petitioner further alleges that in finally placing him in Class I-A by its action on October 12, 1943, said Local Board No. 271 acted arbitrarily and capriciously in that it ignored all the evidence submitted by him in support of his request for deferment, and in that said Board did not make the final decision with regard to petitioner's classification but substituted for its own decision the decision of the said Agricultural War Board in South Dakota or the decision of de Velder as the Chairman thereof with reference to petitioner's agricultural status.

11. Petitioner alleges that he is entitled to be classified under the provisions of the Selective Service and Training Act of 1940, as amended, upon a consideration



of all material evidence; and is entitled as a matter of law to have the discretion of Local Board No. 271 exercised by the consideration of his claim for deferment based upon all the material evidence; that he was and is, under due process of law, entitled to and it was the duty of said Local Board No. 271 to accord him a full and fair hearing on the merits of his claim for deferment; and that by reason of the matters and things herein alleged, and by reason, particularly, of the arbitrary and capricious action of said Local Board No. 271 and the failure of said Local Board No. 271 to exercise any discretion in said matter whatsoever, petitioner has been inducted into the armed forces of the United States and deprived of the due process of the law.

12. Petitioner is informed and believes and upon such information and belief alleges that on or about October 20, 1943, subsequent to the reclassification of petitioner by said Local Board No. 271, W. F. Prisk, the Chairman of said Board, placed in the record of petitioner a letter addressed to said Board concerning petitioner, and that at some time subsequent to October 29, 1943, when said record was returned to said Local Board No. 271 by the Appeal Board without action by the Appeal Board by direction of one Major Frank G. Lyman, Selective Service Coordinator, "for inclusion of additional information" and return of the record to the Appeal Board, Clarence Wagner and Jack Horner, two of the members of said Local Board, each placed and included in the record of petitioner a letter containing statements concerning and highly prejudicial to petitioner, but without giving petitioner an opportunity to examine said letters or to rebut any of the statements contained therein; that said letters of said Prisk, Wagner and Horner contained self-serving and

false statements made by them for the purpose of prejudicing petitioner, and that said statements were in said record when the same was reviewed by the Appeal Board which affirmed the action of said Local Board No. 271, and when said record was reviewed by Col. Kenneth H. Leitch, State Director of Selective Service, who affirmed the action of said Local Board No. 271 on or about November 9, 1943; and that the actions of said Appeal Board and said State Director of Selective Service in considering said statements by said Prisk, Wagner and Horner, and in affirming the action of said Local Board No. 271 in reclassifying petitioner in Class I-A and of said State Director of Selective Service in refusing to permit petitioner to rebut the statements of said Prisk, Wagner and Horner were arbitrary and capricious and contrary to law, and deprived petitioner of the due process of law.

12. There are attached hereto and prayed to be read as a part hereof, copies of (1) petitioner's affidavit to support claim for occupational deferment; (2) thirty-one affidavits signed by residents of South Dakota; (3) copies of letters dated August 18, 1943, September 3, 1943, September 7, 1943 and October 4, 1943, comprising the correspondence between Isaac C. de Velder, Chairman, U. S. D. A. War Board, Douglas County, South Dakota, and said Local Board No. 271; (4) two letters dated September 8, 1943 and September 29, 1943 from the Governor of South Dakota to said Local Board No. 271, and a letter dated September 9, 1943, to petitioner from Hon. Chan Gurney, a United States Senator, and a letter dated October 1, 1943, from Hon. Stewart Sharpe, of Delmont, South Dakota; and (5) certain letters and statements from petitioner to said Local Board No. 271, dated September 11, 1943, September 17, 1943, September 18, 1943, Octo-

ber 11, 1943, and October 12, 1943. All of said documents were a part of the record before said Board on October 12, 1943, when petitioner was reclassified by said Board.

There are also attached hereto and prayed to be read as a part hereof copies of (1) petitioner's letter to said Local Board No. 271 dated October 18, 1943, and of the statement referred to therein; (2) petitioner's notice of appeal and statement on appeal dated October 18, 1943; (3) the report of an investigation made in South Dakota by direction of the Governor of said State in November, 1943, filed with the State Director of Selective Service for California, November 26, 1943; and (4) copies of the statements in said record by W. F. Prisk, Jack Horner and Clarence Wagner, hereinabove referred to, dated October 20, 1943, October 21, 1943, and November 1, 1943, respectively, each of which is denominated "Statement of Personal Privilege".

13. On December 2, 1943, by Special Orders Nos. 276, issued by order of said Lt. Col. A. H. Bailey, District Recruiting and Induction Officer, Los Angeles Armed Forces Induction Station No. 1, California, petitioner was inducted into the Army of the United States, and effective December 23, 1943, called to active duty and proceeded to report at the Reception Center, Fort MacArthur, California, reporting to the Commanding Officer thereat for duty, and by virtue of said special orders, petitioner is now detained and restrained of his liberty by said Col. Jesse J. France, Commanding Officer, Reception Center, Fort MacArthur, California.

14. Petitioner is in all respects subject to induction into the armed forces of the United States under the



Selective Service and Training Act of 1940, as amended, save and except for his claim for deferment and classification in Class II-C in accordance with the provisions of section 5, subd. (k) thereof, and prior to his induction and the filing of this petition exhausted all administrative remedies available to him to establish his right to such deferment and classification.

IV.

Accordingly, petitioner respectfully submits that his detention and the restraint of his liberty are illegal and void upon the several grounds more fully set forth in paragraph II of this petition, which are hereby referred to for the particulars thereof.

Wherefore, petitioner respectfully prays that a writ of habeas corpus be issued by this Court directed to Col. Jesse J. France, Commanding Officer, Reception Center, Fort MacArthur, California, requiring him to have the body of petitioner in said Court at a time and place to be fixed by the Court, then and there to do and receive whatever shall then and there be considered and ordered concerning the petitioner, and that upon the hearing of said writ petitioner may be restored to his liberty and discharged from the Army of the United States.

Dated: December 15, 1943.

Nelson B. Cramer,  
Nelson B. Cramer,  
Petitioner.

Philbrick McCoy,  
Attorney for Petitioner.

[Verified.]

## RESTRICTED

LOS ANGELES ARMED FORCES INDUCTION  
STA NO 1

Pac Elec Bldg 6th &amp; Main St

276

Los Angeles 14 Calif

SO

2 December 1943

## EXTRACT

Extract of

Per ..... Each of the following EM inducted into the AUS this date is released from active duty this date is transferred, to the FRC and will proceed to his home

Name	Asn	Local Board	Home
Nelson B. Cramer	39719417	271	Long Beach, Calif.

Effective 23 December 1943 each of the above named EM of the FRC is called to active duty and will proceed from his home to the Rcpt Ctr Ft Mac Arthur Calif reporting to the CO thereat for duty

Should any of the above named Enlisted Reservists be found to be physically disqualified upon reporting for active duty the necessary steps will be taken to discharge under the provisions of Paragraph 22 b 1, AR 150-5 30 September 1931 Under no circumstances will permanently physically disqualified personnel be transferred back to the inactive Enlisted Reserve Corps

The QM will furnish the necessary T and meal tickets The T directed is necessary in the Mil Serv 1-5090 P 431-02 A 0425-24

By order of Lieutenant Colonel Bailey

A G HARRISON

1st Lt AUS

Executive Officer

Official A G Harrison

A G HARRISON

1st Lt AUS

Executive Officer

FT MAC ARTHUR CALIF

F-39

## INFORMATION FOR SELECTEES

### 1. Reporting for duty

Competent authority has decided that when a selectee has passed his physical examination at Induction Station, notification that he has been found acceptable makes him a member of the Army of the United States. Failure or refusal to take the oath of induction does not alter his status.

As a member of the Army of the United States, whether on active duty or in the reserve, you are subject to the Articles of War, which are the laws governing the Army. In your present status the most important Articles of War to you are the following:

58th Article of War: This article deals with Desertion. If convicted of Desertion in time of War, a soldier may receive the death penalty or such other punishment as a court martial may direct.

61st Article of War: This article deals with Absence Without Leave. Any person subject to Military Law who fails to report at the proper time to his proper post of duty unless given proper leave is guilty of violation of this article, and may be punished as Court Martial may direct.

The essential difference between Desertion and Absence Without Leave is that in the former there is the intention



to remain permanently away from the organization to which assigned. This intent may be formed either prior to or after departure. In Absence Without Leave said intent is lacking.

The Place and time for you to report are shown below:

Date to Report Dec 23 1943

Time to Report 8:45 A. M.

Place to Report P. E. Station—156 West Ocean Blvd., Long Beach, Calif.

If due to an accident or serious illness, you are unable to report at the time specified, you must contact your Local Board and make arrangements for entrainment at a later date.

## 2. Conduct on public carriers.

Any misbehavior, such as disturbing civilian passengers, damaging transportation property and improper dress, is punishable by Court Martial. Such conduct tends to bring discredit upon the Military Service. It is usually traceable to improper use of Alcoholic drinks, excessive use of which may bring total prohibition to the Army.

The Acting Corporal of the group is responsible for maintaining order, and may call upon others in the group to assist him. He will make himself known to the conductor and will cooperate with transportation personnel. In case of disorder, he will make complete reports of the facts on arrival at destination.

[Crest]: State Seal of South Dakota.

M. Q. Sharpe  
Governor

Pierre

22 November 1943

Members of Local Selective Service Board No. 271  
of the State of California

Woodrow Wilson High School  
Long Beach, California

Gentlemen: Re: Nelson B. Cramer, Order No. 1915.

Pursuant to my letter of November 9 1943 advising you that I would have Mr R P Harmon of Belle Fourche, South Dakota, make an independent investigation and report on the status of Nelson B Cramer, above identified, as a farmer, I directed Mr. Harmon to make the investigation and report, and he proceeded to do so.

I have now received from Mr Harmon a written report of his proceedings in the matter, which report consists of four pages, the first of which is entitled 'Belle Fourche, S. D., November 18, 1943,' and is addressed to Hon. M. Q. Sharpe, Governor of South Dakota, Pierre, South Dakota; the other pages of which are designated as page 2, page 3, page 4, November 18, 1943, M. Q. Sharpe, and page 4 being signed 'Sincerely yours, R. P. Harmon.'

To these are attached the following:

List of persons who made affidavit, consisting of 2 pages;

Statement of Roy Folkerts by question and answer, consisting of 2 pages;

Statement of Mrs Dice, consisting of 2 pages, by question and answer;

Statement of Joe Henry, by question and answer, consisting of 3 pages;

Statement of T M Paulson, by question and answer, consisting of one page;

Statement of Mr Muckey, by question and answer, consisting of one page;

Statement of Judge Sharpe, consisting of 2 pages;

Statement of Isaac C DeVelder, consisting of 2 pages;

Statement of Nelson B Cramer, by question and answer, consisting of one page;

Statement of William DeBoer, consisting of one page;

Statement giving information with reference to Mr Cramer's farms.

To some of the statements Mr Harmon has appended his own comments but all of them represent his findings, conclusions, and opinions.

Mr Harmon's calling has been that of a minister of the gospel. He was elected state commander of the American Legion, Department of South Dakota, because of his participation in World War I. He was appointed coordinator of Civilian Defense for South Dakota by my predecessor in office, Governor Bushfield, and when I became Governor I appointed him coordinator of South Dakota Civilian Defense, which, in effect, makes him the supervisor and operator of it.



I think the attached report of Mr Harmon has been made fairly and impartially as a result of his personal inspections and interviews as shown by it. I would personally rely upon his report in the conduct of important affairs of this state.

It is my understanding that our state director of Selective Service, Colonel E A Beckwith, is familiar with the case and would concur in the general conclusions expressed by Mr Harmon. For that reason I am sending a copy of this report of Mr Harmon's to our own director of Selective Service, at Rapid City, South Dakota.

I note that one of the statements attached to the Harmon report is by a Judge Sharpe of Douglas County. As there seems to be some question about the reliability of witnesses because of personal connections with Mr Cramer, I will say that this Judge Sharpe is of no relation to me whatsoever so far as I have ever been able to determine. Although I have been acquainted with him for a number of years and have tried to trace out some relationship, I have been unable to find any.

My only purpose in submitting this material to you is to see that Mr Cramer gets a fair and impartial hearing with a decision based upon the evidence and the merits of the case, which every citizen is entitled to have under our system of government.

Yours sincerely

M. Q. Sharpe

Governor of South Dakota

Attest:

Secretary of State Mrs. L. M. Larsen

Received Office of the Governor Nov 22 1943 Pierre,  
S. D.

Belle Fourche, S. D.,  
November 18, 1943.

Hon. M. Q. Sharpe,  
Governor of South Dakota,  
Pierre, South Dakota.

Dear Governor:

Pursuant to your recent letter directing me to proceed to Douglas County, South Dakota, and there interview certain people, and to reach a conclusion concerning the actual draft status of one, Nelson B. Cramer, I did on the 16th and 17th of November carry out that wish of yours, and I am hereby submitting a report to you, personally, of the impressions made and the conclusions reached in this matter.

I first of all read the entire file and correspondence which had been collected by photostatic copies from the Draft Board in Long Beach, and put into a file by one, Mr. Leland McArthur, who is an assistant in some way to Mr. Nelson B. Cramer.

There is an attached list of the persons who made affidavits concerning Mr. Cramer's status, some thirty three or thirty four in number, and one of my first proceedings when arriving at Corsica, Douglas County, was to ascertain the standing of these men and women who had made these affidavits.

I did not have time, nor feel it was necessary to visit all of these people, but I did interview some of them, and there can be no doubt in anyone's mind that men like Judge Sharpe; Mr. William De Boer, State Representative from Douglas County; Mrs. M. A. Dice; Roy Folkerts, Grain Dealer, are people of the highest type and integrity—no better can be found any where on God's earth. They impress you that way, so I consider statements from them

as to be true facts concerning this case to the very best of their knowledge and ability.

To say that Roy Folkerts would perjure himself so that he might buy an extra five hundred or thousand bushels of grain, or that Judge Sharpe would make false or misleading statements that it might bring him an extra abstract to look over, is inconceivable to any person who has ever met these folks. So, I am convinced that the evidence given in their statements and affidavits are true to the best of their knowledge and ability.

After interviewing some of these people, I drove to the Cramer ranch, where I went over his farm pretty thoroughly. There I found a large amount of machinery, such as tractors, plows, drills, disks, feed grinding machinery, etc., that are used and necessary on a modern farm. A list which is attached later in the file.

I found about 350 acres of farm land under actual cultivation, some in corn and some in small grain, and also found he was feeding a bunch of some fifty head of cattle, thirty head of hogs and about one hundred chickens.

I found from records and facts that Mr. Cramer has been operating this farm since the fall of 1941. At that time he came to South Dakota, purchased about ninety head of cattle in early October, went on to New York State where he had some farm property, sold it, and returned to South Dakota, took care of his cattle that fall and on March first moved on to the ranch and has lived there since that time.

How good, or bad a farmer Mr. Cramer is, is not within my power to say. He may be good, bad or worse—perhaps some expert could classify him in that. I would not attempt it. But for anyone to deny that he has not lived

not R. P. H.

on his ranch and has attempted to be a farmer since



the fall of 1941 is wholly inconceivable and not truthful in its' contents. Especially in view of the testimony of these thirty three neighbors and business men who were in a position to see and to know the facts in this case.

I talked with one, Mr. De Velder, who is head of the Douglas County War Board and the AAA of Douglas County. That there has been ill feeling, heated controversies, between he and Mr. Cramer, there can be no doubt. Mr. De Velder made the statement that he wished to stay by his letter to the Long Beach Draft Board that Mr. Cramer was not essential to the war effort. Mr. De Velder insists that he lived near the Cramer farm and goes past there quite often and has never seen Mr. Cramer doing any farm work.

I then talked to the County Agent, a Mr. Robert L. Pinnow, who is Secretary of the County War Board and asked him where he would classify Mr. Cramer and he  
is R. P. H.

made the statement "I do not think he essential to the war work." I then insisted how he would classify Mr. Cramer and he stated "Cramer was a farm manager and not an actual farmer."

Because of the feeling existing over the Triple A Program which Mr. Cramer has not participated in and in most instances refused his renters on his other five or six farms to participate in, I consider the evidence given by the County War Board Members to be more or less prejudice and personal.

I also visited the Members of the Draft Board of Douglas County, and as this matter was not within their hands they have never made any classification of Mr. Cramer, and naturally do not want to make any. In fact they

should not make any since the case is not within their jurisdiction, and for that reason I do not quote or make any statements from them, or bring them into this review.

That there is feeling in the community that Mr. Cramer should go into the armed forces due to the fact that he is a single man, and, secondly, that he went into the farm business to get away from the actual military service, no one will try to deny. Why Mr. Cramer went into the farming business, I do not have the power of discernment to tell, any more than I know why some others there, went back on farms, or others throughout our state and nation went into essential industries. This much can be said in his favor, however, that he actually was on the farm with his equipment prior to Pearl Harbor. That is a fact that all records and evidence substantiate.

Personally, I feel it is too bad that there are any classifications and deferments. I would much have preferred to have seen the Selective Service Act take any, or every man when his number was drawn out of the hat, regardless of who he was or where he was. But since the Act states that a farmer, or one engaged in agricultural pursuits is to be classified as such, there can be no question or doubt but what Mr. Cramer has equipment, has livestock, is raising grain and performing the agricultural pursuits to the best of his ability on his farm in Douglas County.

As stated before, I do not know how good a farmer he is, but I also have reached the other conclusion that he would not be worth a tinker's darn in the army, and I really think he would be of more service to the United States of America to be kept there operating his farm than he would be in the armed forces.

There is one fact that must not be over looked and that is Mr. Cramer was born and raised on a farm. He

lived with his father on their farm in New York State until after he was nineteen years old, and surely he must have acquired some knowledge of farming.

Mr. William DeBoer, Representative to the State Legislature from Douglas County, who is a retired farmer, but each year does a large amount of thrashing throughout Douglas County, gave me the amount of grain that he thrashed on Mr. Cramer's ranch in 1942 and 1943. In 1942, Mr. DeBoer's receipts show he thrashed approximately five thousand bushel of small grain from the Cramer farm and in 1943, which was a dry season, about twenty five hundred bushel. This was raised by Mr. Cramer and his man Joe Henry.

Young Henry, who is twenty eight years of age, impressed me as a very bright, intelligent, capable young fellow. He is in a deferred draft classification due to the fact that in his high school years in manual training, he sawed off the fingers of his right hand, and, of course, there are some things that he is not capable of doing on the farm due to that affliction. He does make, however, a good boy working there with Mr. Cramer and they seem to get along fairly well in the operation of this 640 acres of land.

I personally talked to Mr. Cramer and I asked him if he was trying to avoid the armed services. This he emphatically denied and said that everyone should do their part where they could do the most and that he felt in operating his ranch, raising three to five thousand bushels of grain, producing fifty to ninety head of cattle and hogs a year, that he was doing more in the support of his government than he could as a buck private in the rear rank.

I, myself, do not like to see anyone dodge the service to his country, and I am very doubtful if Mr. Cramer would



ever pass a physical examination in the army, and would, no doubt, be rejected and turned back to his farm, but since the Selective Service has the provisions for classification of men in various pursuits, one cannot help but arrive at that inevitable conclusion that Mr. Cramer is doing the best he can and is operating his ranch in the production of food.

I am enclosing to you some questions and answers from some of the principal witnesses that I interviewed. I am particularly calling your attention to the statement made by Judge Sharpe, and I think the Judge is in a position to know these things because he has a farm just some two or three miles west of the Cramer place and goes by there quite often. His statement herewith attached was quite impressive to me.

This report is for you, you can use any part, or all of it as you may see fit in any action or communication that you wish to make.

I trust that this will meet with your approval and will come up to your expectations in what you expected me to do.

Sincerely yours,

R. P. Harmon

Henry Poelstra

Corsica

Dick Vanderpol

"

John H. Teeselink

"

Elmer Schipper

"

Verne Beukelman

"

Marion Van Zee

"

Ray Beukelman

"

Earl Vanden Hoek

"

Arie E. Van Zee

"

E. A. Van Zee

"

Peter Westra

"

Isaac C. De Velder, Chairman Douglas County U. S. D.  
A. War Board

Fred H. Breukelman, Publisher of the Corsica Globe

T. A. Gregory

Raymond E. Miller

Ed Krediet, Mayor of Corsica

McFarland, Veterinarian, Plankinton, South Dakota

Geo. Faber, Veterinarian, Mitchell, South Dakota.

Robert L. Pinnow, County Agent

Carl Floete, Chairman of the Draft Board

LeRoy Bamburg, Corsica, Implement Dealer

Mrs. John Vama Vorse (where Cramer roomed at one time)

Affiant born on a farm at Lafayette, County of Onondaga, State of New York. (Nelson Baker Cramer)

Henry Poelstra	Corsica
Dick Vanderpol	"
John H. Teeselink	"
Elmer Schipper	"
Verne Beukelman	"
Marion Van Zee	"
Ray Beukelman	"
Earl Vanden Hoek	"
Arie E. Van Zee	"
E. A. Van Zee	"
Peter Westra	"

ROY FOLKERTS' STATEMENT.

Mr. Harmon: Roy, what is your occupation?

Roy Folkerts: I am a grain dealer.

Mr. Harmon: How long have you been a grain dealer?

Roy Folkerts: Nine years.

Mr. Harmon: You buy from anyone and everyone?

Roy Folkerts: Anyone that wants to sell to us.

Mr. Harmon: Are you acquainted personally and in a business way with Nelson B. Cramer?

Roy Folkerts: Yes I am.

Mr. Harmon: Has Mr. Cramer ever sold grain to you?

Roy Folkerts: Yes. He sold a lot of grain to us. He has a lot of farms out here besides the one he operates himself.

Mr. Harmon: Do you know yourself that Mr. Cramer owns and operates a farm?

Roy Folkerts: Yes, I know that definitely.

Mr. Harmon: Have you ever visited Mr. Cramer's farm?

Roy Folkerts: I have been on the place, yes.

Mr. Harmon: Has Mr. Cramer himself ever hauled grain or produce to your elevator?

Roy Folkerts: Yes he has.

Mr. Harmon: Then you would say Roy that you believe Mr. Cramer to be as much of a farmer as any other farmer living around this

Roy Folkerts: Yes, I think so.

Mr. Harmon: There is no personal reason that you should make these statements is there Roy?

Roy Folkerts: No personal reason whatsoever. I would make these statements for anybody under the cir-



cumstances, anybody being a farmer that way, that is all there is to it, he is a farmer as far as I am concerned.

Mr. Harmon: How long has Cramer, to your knowledge, been working out on his farm?

Roy Folkerts: I don't know when he came, but think it is three years or better.

Mr. Harmon: But he has actually been engaged in farming on his farm in the last three years?

Roy Folkerts: I wouldn't say three years for certain. These times go so fast that I can't keep up with them.

Mr. Harmon: You know Roy why that I am here in regard to Mr. Cramer's military induction status—You would say then without fear or favor that you consider him an actual dirt farmer.

Roy Folkerts: I do absolutely, because I am not the kind just to want to cover someone up to keep them out of the army as I don't believe in that. The farmers being deferred, he has just as much right as anybody. But the quicker we get away from that, the better. Deferring farmers is wrong in the first place. But since Mr. Cramer is a farmer, he has just as much right as anybody.

Mr. Harmon: To your knowledge or belief, has there been any friction in the community about Mr. Cramer's induction into the service?

Roy Folkerts: Well as far as I know it is just between a few certain parties is all, but the people as a whole, I don't think so.

Mr. Harmon: Do you know any reason why this feeling has arisen?

Roy Folkerts: Well maybe we shouldn't put that in record. It is just politics to my notation is the greatest extent.

Mr. Harmon: Was there any reason why he knew these antagonisms should arise in this community?

Roy Folkerts: The party he has his trouble with is on the other side of the fence. In other words he is not sticking his neck out. Mr. Cramer never did want to be regimented and we all know that is the bone of contention—having his property here and getting considerable property since they have regimented them into Triple A, I think that is where the whole trouble is.

Mr. Harmon: Then by personal observance and knowledge of what constitutes a farmer in this community, you would say that Mr. Cramer was a One 'A' or First Class farmer?

Roy Folkerts: He is strictly a farmer—that is what he is and really works at the job, absolutely, and I will say that to anybody. I am not trying to cover up for anybody, and as I said before I don't believe in deferring anybody, but that is law. I know if my number came up, I would want to go.

Mr. Harmon: How long have you lived here?

Roy Folkerts: Seventeen years.

Mr. Harmon: To the best of your knowledge and belief Roy, the statements are true and correct?

Roy Folkerts: Yes.

#### MRS. DICE'S STATEMENT.

Mr. Harmon: How long have you lived here in Corsica?

Mrs. Dice: Since 1917.

Mr. Harmon: You are quite familiar with people and records?

Mrs. Dice: I have been in the banking business since that time, about twelve years back.

Mr. Harmon: How long have you known Mr. Nelson B. Cramer?

Mrs. Dice: I believe it was 1940 when he came here to look at the interests of his land. I think that was the first time I became acquainted with him. I never had any business dealings until about that time.

Mr. Harmon: You have some business dealings with him now?

Mrs. Dice: No. I sold him the old bank building and a couple of farms.

Mr. Harmon: Have you ever visited Mr. Cramer's farm on which he resides?

Mrs. Dice: Yes. I have been out there to dinner. On insurance business. My son does insurance work. I work with him. We know all his farms around here because we have insurance on them.

Mr. Harmon: On Mr. Cramer's farm?

Mrs. Dice: Yes.

Mrs. Dice: We sold him a place, two or three places right near where he lives. He has a man Mr. Henry that lives with him.

Mr. Harmon: Well, Mrs. Dice, as you think of a farmer around through this community, would you honestly and conscientiously say that Mr. Cramer was a farmer.

Mrs. Dice: I don't know what you call a farmer. Whatever you call farming, I think he does as much as any other farmer around here. I consider him quite a big farmer myself. Of course he has so much to put in that he does have to hire help.

Mr. Harmon: Mrs. Dice, besides managing his farms, do you have a personal knowledge that Mr. Cramer does actually farm, or what we might say actual dirt farming?



Mrs. Dice: He goes out and puts in his grain; helps with the harvest; husks corn; feeds his stock—I know that, as I have seen him do these things.

Mr. Harmon: Personally?

Mrs. Dice: Yes Sir.

Mr. Harmon: You know that there has been a heated controversy over Mr. Cramer's military status and a Mr. De Velder who is County Chairman of the AAA Board states that Mr. Cramer never does manual labor himself, but hires it all done. From a personal knowledge could you refute that statement of Mr. De Velder?

Mrs. Dice: I don't like to contradict anyone's statement, but to the best of my knowledge, I would say that Mr. Cramer actually does farm and looks after his places.

Mr. Harmon: Mrs. Dice, simply because you might do a little insurance business with Mr. Cramer would not lead you as an American citizen to try to defer anyone who you feel should do military service to the United States, would it?

Mrs. Dice: Indeed not. I feel about Mr. Cramer the same as anyone else that should be asked for military service and if he qualifies, he should go the same as my son or anyone's. But I don't think Mr. Cramer would even pass if he were to go. I have told Mr. Cramer that if it were me, I would take an examination for the Army or Navy for the good of his country, but he feels that with the interest he has in property that he should be exempt, the same as any other farmer. That is what he has told me. The reason I made the affidavit was purely because he is as much a farmer as any other farmer around here, and more so. It is friendship, not past business that has anything to do with that at all. We could get along very nicely without his business. If I

wanted to be dishonest, I would not attempt to make a false statement to keep anybody from the Army. My son didn't pass and I feel very sorry about it. He spoke several times about enlisting, but I felt he should wait until he was called. I think a mother knows her children better than they do themselves sometimes.

Mr. Harmon: To the best of your knowledge the above statements are true, Mrs. Dice?

Mrs. Dice: To the best of my knowledge they are true. I believe in being fair. I don't believe in contradicting anybody's statement. I believe in fair play to every American citizen.

#### JOE HENRY'S STATEMENT.

Mr. Harmon: How old are you Mr. Henry?

Joe Henry: Twenty eight.

Mr. Harmon: How long have you lived in South Dakota?

Joe Henry: Two years.

Mr. Harmon: When did you come here?

Joe Henry: I didn't stay here the first time I came through. It was in the spring of 1940 when I came here. We went back East, gone about three months and back again in the fall.

Mr. Harmon: Have you lived here since the fall of 1940?

Joe Henry: No. It was 1941.

Mr. Harmon: What time in 1941

Joe Henry: It was in the fall of 1941.

Mr. Harmon: The fall of 1941. Did you come here with the intention of living in South Dakota?

Joe Henry: Yes.

Mr. Harmon: Was that previous to the United States entry into the World War?

Joe Henry: Yes.

Mr. Harmon: You came here with Mr. Cramer?

Joe Henry: Yes.

Mr. Harmon: The idea your coming was to work on Mr. Cramer's farm?

Joe Henry: Yes.

Mr. Harmon: And you have lived with him on the farm since the fall of 1941?

Joe Henry: You see in the fall we bought some cattle when the sales were going around. Then he had some business in California and I went with him, and then returned and have lived here since.

Mr. Harmon: All of this was previous to Pearl Harbor or December 7, 1941?

Joe Henry: Yes.

Mr. Harmon: You worked on Mr. Cramer's farm as his hired man?

Joe Henry: Yes.

Mr. Harmon: How many acres of ground do you actually cultivate?

Joe Henry: There must be in the neighborhood of about 350.

Mr. Harmon: Well that is in round number, approximately?

Joe Henry: Yes.

Mr. Harmon: Do you have any other help besides you and Mr. Cramer?

Joe Henry: No, not right now. Have had off and on during the harvest and rush periods.

Mr. Harmon: How many head of cattle do you have on the farm?



Joe Henry: Fifty head.

Mr. Harmon: Is that about an average amount of cattle or stock. You usually have a pretty big bunch of cattle.

Joe Henry: This time last year we had ninety two. We have registered cattle now. Keep the grade cattle for milk.

Mr. Harmon: Joe, does Mr. Cramer actually work on the farm at manual labor doing the same kind of work of any farmer or farm hand would do?

Joe Henry: Yes.

Mr. Harmon: In other words, he actually feeds the cattle, drives the tractors, hauls the grain and is engaged in actual farming?

Joe Henry: Yes.

Mr. Harmon: Mr. Henry, are there other farmers living near or around Mr. Cramer's ranch who have exchanged work with Mr. Cramer?

Joe Henry: Yes.

Mr. Harmon: Would you give me the name of one or two of the farmers?

Joe Henry: John Teeselink and William Muckey.

Mr. Harmon: Has there been any regular employed on the ranch with you and Mr. Cramer since 1941.

Joe Henry: No. The longest one we have had there has been about seven months.

Mr. Harmon: The rest of the time you and Mr. Cramer do all the work.

Joe Henry: Yes.

Mr. Harmon: Would you say that he puts in as much time and does as much work on a basis with yourself?

Joe Henry: Equally divided. He does his share of the work.

Mr. Harmon: Would you take us to the ranch so that we could personally look over the farming interest of Mr. Cramer at this time?

Joe Henry: Yes.

Mr. Harmon: You don't know of any personal reason outside of the fact that his farming interests that Mr. Cramer would not want to serve in the armed forces of the United States?

Joe Henry: No.

Mr. Harmon: Then you consider Mr. Cramer an actual dirt farmer?

Joe Henry: Yes.

Mr. Harmon: How do you account then for the fact that a Mr. De Velder, Chairman of the South Dakota War Board has written statements to Mr. Cramer's Draft Board stating that he is not a farmer but an over-seer?

Joe Henry: That I don't know, because there has been nobody on the place to see what he has been doing at all. The only farmers that have been on the place is a Mr. Ver Steeg in the Triple A to come out and check our crops to see the number of acres.

Mr. Harmon: How far does Mr. Isaac C. De Velder live from Mr. Cramer's ranch?

Joe Henry: If you go right to the house, it is a mile, but his land is only one half mile from us, north.

Mr. Harmon: Are Mr. De Velder and Mr. Cramer friends, or has there been words and controversies between them?

Joe Henry: Well, by that if you mean passing the time of the day to each other yes. If they get to arguing on this Triple A, I would say no.

Mr. Harmon: Have they had arguments on the Triple A?

Joe Henry: Yes.

Mr. Harmon: Where did these arguments take place?

Joe Henry: In the Triple A office in the Court House in Armour—all of the ones I have been present at.

Mr. Harmon: Were you present at some of these arguments?

Joe Henry: Yes.

Mr. Harmon: Did they become quite heated?

Joe Henry: Yes.

Mr. Harmon: Were any attempts of undo persuasion or statements made at those arguments?

Joe Henry: Yes there was.

Mr. Harmon: What was said to the best of your recollection?

Joe Henry: They were arguing about the Triple A. Ike (De Velder) against Nelson (Mr. Cramer) of wanting to come out here and run the county. De Vedler told Cramer that he was just those G..... D..... small potatoes from New York. He made the statement that it was too bad that Nelson hadn't got his the same time as his dad got his.

Mr. Harmon: In other words you think there is some enmity between the two men?

Joe Henry: Yes there is.

Mr. Harmon: Mr. Henry, you say you are twenty eight years old. What did you do previous to coming to South Dakota?

Joe Henry: I was going to Junior College before I came to South Dakota.

Mr. Harmon: Did you finish High School?

Joe Henry: Yes. I took post graduate work too.



T. M. PAULSON'S STATEMENT.

Mr. Harmon: You are a Member of the Draft Board of Douglas County?

Mr. Paulson: Yes.

Mr. Harmon: Do you have any knowledge or rumors of this man Mr. Cramer going

Mr. Paulson: I don't know a thing.

Mr. Harmon: You know nothing?

Mr. Paulson: Not a thing. All I know Mr. Cramer was down here once and said that the Sherriff had said that I sent him out to look at his draft card. I said that was a lie, I didn't think that was any of my business, that there must be other Boards to check up on him. We never have been called upon in any way through the Selective Service.

Mr. Harmon: From a personal knowledge, do you know anything about Mr. Cramer as a farmer?

Mr. Paulson: I know nothing. I see Mr. Cramer on the streets and that is all. Never been on his place.

Mr. Harmon: You don't know then whether he farms or not?

Mr. Paulson: No sir, I don't.

Mr. Harmon: Has he ever made any shipments of grain, cattle or produce?

Mr. Paulson: He never has made a shipment of any kind on this railroad. That doesn't mean a thing. Big farmers don't make shipments over the railroad.

Mr. Paulson: I will say that I don't see why he shouldn't be in the army, he is wealthy, has as much to defend as you and I.

Mr. Harmon: That is what I am trying to find out.

Mr. Harmon: Has your local Draft Board ever discussed Nelson B. Cramer's military status?

Mr. Paulson: As a Board, no, we never did.

Mr. Harmon: Never have been asked to either?

Mr. Paulson: There is a file down there on him, but I wouldn't want to say right now either whether we ever officially discussed him or not.

Mr. Harmon: Could we see this file?

Mr. Paulson: I don't know, you would have to see the Clerk. There was a man here last summer from the newspaper out in California investigating Mr. Cramer. He sent me a copy of the paper. He was a very nice fellow. He said he was a Reporter from Long Beach. I have no desire to get tangled up. He doesn't mean (snap of his finger) to me.

Mr. Harmon: I don't want to either.

Mr. Paulson: I have two boys in the service and I think there are a lot of other boys that should be in the service. I have never made in public a statement about anyone should go to the Army.

#### MR. MUCKEY'S STATEMENT.

Mr. Harmon: You live on one of Mr. Cramer's farms?

Mr. Muckey: Yes.

Mr. Harmon: How long have you lived here?

Mr. Muckey: Two years.

Mr. Harmon: Have you ever exchanged work with Mr. Cramer?

Mr. Muckey: What do you mean?

Mr. Harmon: Have you ever, like you farmers do, exchange work?

Mr. Muckey: Yes, I have that, you bet.

Mr. Harmon: Have you ever seen Mr. Cramer actually engaged in manual labor on his farm?

Mr. Muckey: Yes I have. I have seen him scoop grain and

Mr. Harmon: Have you seen him plow the field with his tractor?

Mr. Muckey: I can't say—I have been busy at my own place.

Mr. Harmon: He farms his own farm?

Mr. Muckey: As far as I know he handles what is farmed over there.

Mr. Harmon: He has been doing that for a couple of years?

Mr. Muckey: Yes, maybe three years, isn't it Joe?

Mr. Harmon: That is all. I wondered if he actually did the work or over see on his place.

Mr. Muckey: As far as I know he takes care of his place.

### JUDGE SHARPE'S STATEMENT.

Mr. Sharpe: I will make a statement something like this for you:

"I have been County Judge since January 1, 1915, except four years when I was States Attorney. I will not hold Mr. Cramer up as a saint. He has his faults and his virtues, and my relations with him have been pleasant. He is honest and trustworthy. I have never known him to cheat anyone. He doesn't drink a drop to my knowledge, smoke nor gamble, or loiter in the Pool Halls or questionable places. He is energetic.

I have visited his 640 acre farm in Iowa Township, Douglas County, a number of times. I own land west of him. His land is located in a good productive area and is devoted to small grain and livestock, and like other farms in his community.



I have seen him in over-alls, mending fences, oiling machinery, loading hogs for market, hauling farm produce, hauling fence posts and material to his farm, and on one occasion that I was out there he was helping the Veterinarian from Plankinton vaccinate hogs and cattle. Cramer was out in the pasture driving the animals up into the pen. I have seen him do other farm work and he appeared to me to be devoted to his work.

Last summer I noticed that the Township Supervisors graveled that mile road leading from the gravel highway to the Cramer farm entrance for his benefit.

The farm he occupies looks better now than ever before, I am told. Sam Plooster, a neighbor told me that. He built a three room garage on it in 1943. He has bought wire and many fence posts. His fences are in good shape.

Mr. Cramer lacked farm experience at first, but studied it and has done well at it. He can now talk farm problems and livestock raising as well as the average farmer. He made some bad deals, was imposed on, but also made some good deals, but all in all has made a success at farming.

His hired man, Joe Henry has been with Cramer since the middle of 1941.

I understand that Ike De Velder, who is Chairman of the AAA in Armour, dislikes Cramer intensely. He has criticized him in my presence, thinking I would relay it on to Cramer. He told the Sheriff that I would lose votes if I counseled with Cramer. He doesn't exchange farm work with De Velder, his nearest neighbor, and I would say the trouble started over the Farm Program. Cramer refused to cooperate one hundred per cent. He advised his tenants to stay out of it. He told he claimed De Velder caused his loss by advising him that he would be

eligible for barley, rye and wheat loans by merely staying inside the wheat acreage, but when it come to getting the loans on his rye and barley, De Velder told him that he hadn't complied with certain soil practices.

There has probably been some loose talking by both sides and carried to each other's ears and it was magnified. You know how those things get to going.

Some in the neighborhood don't like Cramer. He has ejected some poor tenants, and other tenants he has refused to rent to, and all of his tenants pay him two fifths instead of one third share, and they grumble. He won't accept poor excuses, doesn't hesitate to sue for payments when they are due. He dislikes anyone who fails to meet his debts.

He dresses well when on business trips. This possibly creates enmity. He didn't readily adapt himself to his environment at first, but has overcome this and now seems to get along agreeable with people.

In view of the man power shortage it would be to the best interest of our production program to give Mr. Cramer benefit of doubt and keep him on the farm. It is rather inconsistent to complain of the acute labor shortage with insisting on increasing it by inducting Cramer in the army. He is about thirty six years old, too old for good army material, so why not keep him where he can be of most benefit.

There are good and poor farmers, but that is not the issue in my opinion. The issue to be decided is whether Cramer is engaged full time in agriculture. I see no valid reason why he shouldn't be classified as all others similarly engaged. Why further handicap our farm effort by needlessly decreasing our available man power and adding to an already grave situation in keeping our production to the utmost.

## ISAAC C. DE VELDER'S STATEMENT.

Mr. Harmon: How long have you known Mr. Cramer?

Mr. De Velder: I have known Cramer for I would say ten years, probably a little longer than that.

Mr. Harmon: How long has he lived here to your knowledge?

Mr. De Velder: (Gave Mr. Harmon some correspondence to read over).

Mr. Harmon: Have you ever visited Cramer's farm, Mr. De Velder?

Mr. De Velder: Oh yes, I drive right past his place. Here is the way that land lays (He shows Mr. Harmon).

Mr. Harmon: This letter you wrote, were you requested by the Selective Service Board to make a report?

Mr. De Velder: That is right, that is why I have them all together. They are right in rotation the way I have filed them.

Mr. Harmon: Mr. De Velder, for my own personal knowledge of the thing, it is a fact that Mr. Cramer lives on a farm and has lived there for two years and he has some livestock—How do you arrive at the authority to certify as to production of the farm?

Mr. De Velder: Well, I am Chairman of the War Board. What consideration we take is a man out there on a farm. This man is spending practically all of his time on the road.

Mr. Harmon: Your knowledge is that Cramer doesn't farm. He uses that place as a hide out.

Mr. De Velder: I'll tell you I don't know just what the deal is, either you are out here trying to get information, or getting information for Cramer.

Mr. Harmon: I am not interested in any one. First time I ever *meet* you or Cramer.



Mr. De Velder: That is the reason I am asking this question. This other man out here from Long Beach is evidently out for Cramer, because he has been staying out there ever since.

Mr. Harmon: This man McArthur?

Mr. De Velder: I have given to the best of my knowledge like I state in that letter. We have taken this from his records. The amount of work he had done with the help he has, certainly he doesn't spend any time on that farm, does he?

Mr. Harmon: Who is Henry Poestra?

Mr. De Velder: He is one of his neighbors that lives 1½ miles west of his place.

Mr. Harmon: In your reply to this Board, was this a request from the Board in Los Angeles to your Board here?

Mr. De Velder: That is right.

Mr. Harmon: Your reply that was made was action by the Board, or personal?

Mr. De Velder: This whole thing I have taken care of until I get to the last letter. You will see that I take care of all the correspondence because our Board is hardly ever at home.

Mr. Harmon: Your Board doesn't classify him as a farmer?

Mr. Velder: Yes, that is right.

Mr. Harmon: This was in your opinion, a conscientious opinion of your Board?

Mr. De Velder: I would absolutely say this was correct.

Mr. Harmon: How many members do you have on this Board?

Mr. De Velder: Four.

Mr. Harmon: Were they all present?

Mr. De Velder: That is what the letter states. What I would like to see is be fair to the War Board is for you to talk to the neighbors and also contact LeRoy Bamburg and Mr. De Boer, State Representative, he lives right in Corsica.

Mr. Harmon: Is there any sentiment in the community about?

Mr. De Velder: Oh no, you can take all these affidavits that he has got I told the truth as near as I could. I gave an unbiased statement. (Bamburg told that he signed because other boys were staying out of the army.)

Mr. Harmon: Have you any other statements on the deal?

Mr. De Velder: As far as I am concerned, my statement is that I have never seen Mr. Cramer do any farm work what-so-ever. Ask anybody that lives along that highway and you will find that he goes to Corsica from two to four times a day.

Mr. Harmon: You and Nelson friendly?

Mr. De Velder: As far as I am concerned I have nothing against him. As far as he is concerned, the best thing he could do to me would be to put me where I couldn't look up.

Mr. Harmon: He claimed unbeknown to him that you signed up his tenants on an AAA Program.

Mr. De Velder: No, the tenants signed themselves.

Mr. Harmon: Is there anything else you would like to tell me in this deal?

Mr. De Velder: I think I have covered this as far as I would care to go. I have conscientiously given the truth and this is my statement.

NELSON B. CRAMER'S STATEMENT.

Mr. Harmon: How old are you?

Mr. Cramer: I will be 36 the 10th of January.

Mr. Harmon: Have you ever been sick?

Mr. Cramer: I had a nervous break down, sprained back, ankle.

Mr. Harmon: How long were you afflicted with your nervous break down?

Mr. Cramer: I was in the hospital about six months. Worried over these places.

Mr. Harmon: That was two years ago?

Mr. Cramer: No, four years ago, put me in the hospital and drugged me to death.

Mr. Harmon: What are you going to do about it if you don't get any action through here to be out there for Monday morning?

Mr. Cramer: I don't know. I have to be there. May drive to Omaha tomorrow night and catch the train out.

Mr. Harmon: You don't have any fear or dread of induction into the service?

Mr. Cramer: Hell no—I would have it much easier in the army.

WILLIAM DE BOER'S STATEMENT.

We interviewed Mr. De Boer and he wants to emphatically stand by the statement that he made. He thrashed two years for Mr. Cramer and approximately five thousand bushels of grain was thrashed last year. Thrashed again this year, and it was around a sixty dollar thrash bill, or about twenty five hundred bushels.

Mr. Harmon: Mr. De Boer did Cramer work at the farm as far as you could determine?



Mr. De Boer: Yes, as far as I know he does farm labor and farm work. He has two hired men and know that he knows something about farming. There are some things he has an eastern thought on farming than from here. He is a good citizen.

(Mr. De Boer made the statement upon his honest opinion.)

(He really believes he should be classified as a farmer.)

### FARMS.

160 Acres—Wynand Plooster, Tenant. Also signed affidavit for Mr. Cramer.

Three miles West and One Mile North of Corsica.

160 Acres—Ray Bordewyk, Tenant.

Three miles West and two miles north of Corsica.

160 Acres—Henry Groeneweg, Tenant.

Three miles west, two miles north, then one and one half mile west again.

160 Acres—Marion Krediet, Tenant.

8½ miles West.

160 Acres—F. Brower, Tenant.

Nine miles West. (Two old bachelors lived on this place for 43 years. Renters all that time. They now sublease the land and live in town.)

217 Acres—This belongs to Joe Henry. (De Velder's son now lives on this place.)

160 Acres—Wm. Muckey, Tenant.

Nine miles west and 2½ miles south.

217 Acres—John Teeselink, Tenant, second year.

9 miles West. Across is where Isaac De Velder farms. Practically same amount of land.

One bare quarter. Nelson's also.

64 Acres hay land. Tenant takes care of cultivated land. We receive the hay land. Eight miles west.

One quarter across road bare is included in where they live. Three quarters strung out.

100 Acres cultivation on home place.

One set of plans for each place. All alike, except where something has burned and had to be replaced.

64 Acres hay

50 head cattle

30 head hogs (sold 17)

100 chickens

4 horses

Tractor

Seeder

Rake

Mower

Disk

Cultivator

2 Wagons: One hay; One grain box

2 —16" double plows

Feed grinder

Truck: grain box and stock rack

4 section drag—Harrow

Tractor Cultivator

Endorsed: Filed Dec. 16, 1943.

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 16th day of December, in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 3319-RJ

In the Matter of the Petition of

NELSON B. CRAMER

for Writ of Habeas Corpus.

Good cause appearing therefor, it is ordered that this cause be transferred to the Division of Judge Jenney for all further proceedings.

It appearing to the Court that the Writ of Habeas Corpus issued December 13, 1943 having been inadvertently served upon Col. Wm. W. Hicks, C. A. C., the same is ordered discharged and said Col. Hicks is relieved of any responsibility or response thereunder, and petitioner having this day, through his counsel, Philbrick McCoy, Esq., presented for consideration and filing, an Amended Petition for Writ of Habeas Corpus, the Court, in the presence of respective counsel, James M. Carter, Esq., Assistant U. S. Attorney, Philbrick McCoy, Esq., for the Petitioner, the Government having interposed no objection thereto, considers said Amended Petition, deems the same sufficient, accordingly, orders



said Petition filed and directs the issuance of a Writ of Habeas Corpus directed to Col. Jesse J. France, Commanding Officer, Reception Center, Fort Mac Arthur, California, to be returnable before Judge Ralph E. Jenney, in Courtroom No. 3, United States Post Office and Courthouse building, Los Angeles, California, on December 29th, 1943 at ten o'clock a. m.

It is further ordered that all exhibits annexed and appended to the original Petition for Writ of Habeas Corpus herein, be considered annexed to, appended to and marked as exhibits, to the Amended Petition for Writ of Habeas Corpus filed this day, the same to be considered by the Court at the hearing on the return, on December 29th, 1943.

#### HABEAS CORPUS.

United States District Court, Central Division, Sou.  
District of Calif.

#### THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To Col. Jesse J. France, Commanding Officer, Reception  
Center, Fort MacArthur, California,

Greeting:

You are hereby commanded, that the body of Nelson B. Cramer by you restrained of his liberty, as it is said detained by whatsoever names the said Nelson B. Cramer may be detained, together with the day and cause of being taken and detained, you have before the Honorable Ralph E. Jenney, Judge of the United States District Court in and for the Southern District of California at the court room of said Court, in the City of Los Angeles, Cal. at 10 o'clock a. m., on the 29th day of December, 1943,

then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Paul J. McCormick, United States District Judge at Los Angeles, California, this 16th day of December, A. D. 1943,

(Seal)

EDMUND L. SMITH,

Clerk.

By B. B. HANSEN,

Deputy Clerk.

### RETURN ON SERVICE OF WRIT.

United States of America     )  
 Sou. Dist of Calif.         ) ss:

I hereby certify and return that I served the annexed Petition for Writ of Habeas Corpus, Amendment and Writ of Habeas Corpus on the therein-named Col. Jessi J. France, Commanding Officer, Reception Center, Ft. *Mc* Arthur by handing to and leaving a true and correct copy thereof with Col. Jesse J. France, Commanding Officer, Reception Center, Ft. *Mc*Arthur personally at Ft. *Mc*Arthur in said District on the 16th day of Dec., A. D. 1943.

Robert E. Clark,

U. S. Marshal,

By John P. Brooke,

Deputy.

Marshal's Fees	\$4.00
Mileage	\$1.62
Expenses	\$.....
Total	\$5.62

Endorsed: Filed Dec. 20, 1943.

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS.

Comes Now Colonel Jesse J. France, and for his Return to the Writ of Habeas Corpus states as follows:

That he is a Colonel in the Army of the United States and is Commanding Officer of a Reception Center, Fort MacArthur, California;

That the records and files concerning Nelson B. Cramer, petitioner herein, show that on December 2, 1943 said Nelson B. Cramer reported to an Induction Station under the Selective Service and Training Act and took the oath for induction into the Army of the United States and was thereupon assigned Serial Number 39719417; that the said Nelson B. Cramer was assigned to the Enlisted Corps Reserve and was, pursuant to the Regulations of the United States Army, allowed to proceed to his home and given orders to report on December 23, 1943 at 8:45 A. M., at the Pacific Electric Station, 156 West Ocean Boulevard, Long Beach, California, for transport to Fort MacArthur, California; that the records and files concerning Nelson B. Cramer were thereupon forwarded from the Induction Station to the Reception Center at Fort MacArthur;

That the furlough so granted to Nelson B. Cramer has been extended to December 29, 1943; that the said Nelson B. Cramer has not yet reported to said Reception Center and will not report until late on December 29, 1943; but the respondent is informed and believes that the said Nelson B. Cramer will be personally present in the Court Room of the Honorable Ralph E. Jenney in the United States Post Office and Court House at Los Angeles on December 29, 1943, at 10:00 A. M.;



That the petitioner is not detained or restrained of his liberty except as set forth above, but that petitioner is now in the Army of the United States and subject to the rules and regulations of the Army and subject to orders of the Officers of the Army of the United States, including this respondent;

That your respondent has no information as to the steps and proceedings leading up to the classification and induction of the said petitioner except as set forth in the Petition for Writ of Habeas Corpus served upon him, but respondent is informed and believes that all proceedings concerning the classification of petitioner, the order to report for induction, and induction were carried on pursuant to the rules and regulations as set forth in the Selective Service and Training Act of 1940;

That basing his belief on the facts and matters above set forth, your respondent denies generally and specifically each and every allegation set forth in the Amended Petition for Writ of Habeas Corpus in Paragraphs I to IV, inclusive, except as heretofore set forth by this respondent;

Wherefore, respondent prays that a hearing be had in the above matter; that the Court discharge the Writ of Habeas Corpus, and that this respondent be released of further appearance before this Court.

Jesse J. France,  
Jesse J. France,  
Colonel, Army of the United States.

[Verified.]

[Endorsed]: Filed Dec. 23, 1943.

[Title of District Court and Cause.]

STIPULATION AS TO TRAVERSE TO RETURN.

It is stipulated between the petitioner in the above entitled matter, Nelson B. Cramer, by his attorney of record, and by the respondent, Col. Jesse J. France, by the United States attorney for the Southern District of California, his attorney of record, that the Amended Petition for Writ of Habeas Corpus filed herein December 16, 1943, shall constitute petitioner's traverse to the Return of Writ of Habeas Corpus made by said respondent.

Dated at Los Angeles, California, December 29, 1943.

Philbrick McCoy  
PHILBRICK MCCOY  
Attorney for Petitioner  
CHARLES H. CARR  
United States Attorney  
JAMES M. CARTER  
Asst. United States Attorney  
By JAMES M. CARTER  
JAMES M. CARTER  
Attorneys for Respondent.

[Endorsed]: Filed Dec. 30, 1943.

## PETITIONER'S EXHIBIT 1.

United States Department of Agriculture  
U. S. D. A. War Board  
Armour, South Dakota

August 18, 1943

Local Board #271  
Long Beach, California

Gentlemen:

Your letter of August 12 addressed to Mr. L. Q. Ellis of Mitchell and which inquires as to Nelson Baker Cramer has been referred to the writer as chairman of the U. S. D. A. War Board of Douglas County, South Dakota.

The writer, being also the chairman of the Douglas County Agricultural Conservation Association, has access to the records of such organization and from such records and also as the nearest neighbor to the farm occupied by Mr. Cramer, answers your inquiry as follows: That Mr. Cramer, through inheritance, is the owner of a substantial acreage of farm land in Douglas and other South Dakota counties. That Mr. Cramer was not personally engaged in farming prior to the entry of the United States into present war.

That all of his farm land had been and, with the exception of 569 acres, now is rented out to tenants operating upon their own account on a 2/5th's share basis.

That as to such rented lands Mr. Cramer's sole responsibility is the collection of rentals from such tenants and, of course, the customary observation and supervision that any owner of property practices to prevent waste or damage.

That as to the 569 acres of which Mr. Cramer took actual possession on March 1, 1942. The facts are that



(Petitioner's Exhibit 1.)

343 acres are crop land and the remainder is hay and pasture land.

That reporting as to the current farming season Mr. Cramer stated to the Agricultural Conservation Association that his intentions were to plant 150 acres of corn and 220 acres of small grain but that in fact he did plant approximately 275 acres of corn and 68 acres of small grain.

That during the 1943 planting season Mr. Cramer employed three hired men continuously but that notwithstanding such fact Mr. Cramer employed one, Tim Krediet, to drill in all of the small grain, to plant all his corn and to plow 100 acres of the corn ground, using his own machinery and equipment, such being known as custom work in this area.

That at present Mr. Cramer has two hired men on his farm.

That at no time during the past two years has Mr. Cramer personally done any farm work whatever himself.

That at no time has Mr. Cramer displayed any knowledge of farming which would qualify him to supervise the hired men doing the work on such farm.

That according to the A. C. A. records as of January 1, 1943, the following livestock was maintained upon Mr. Cramer's farm, viz: 68 head of cattle, of which all but one are stock cattle, only one of the same being a milk cow, 80 head of pigs, 150 hens, 3 brood sows.

I will be pleased to give you any further available information which you may require.

Respectfully yours,

Isaac C. De Velder,

Chairman Douglas County U. S. D. A. War Board

(Petitioner's Exhibit 1.)

September 3, 1943

Isaac De Velder, Chairman  
U. S. Department of Agriculture  
County War Board  
Armour, South Dakota

Re: Nelson Baker Cramer, Order No. 1915

Dear Sir:

This will acknowledge your letter of August 18, 1943, regarding the above named registrant and we thank you for the complete report.

No formal action has been taken upon reclassification by the members of this board, as a special effort is being made to have a full board present when final decision is made. Due to the pressure of work in the business world, one or two board members could not meet on days scheduled for meetings. At present, we have a meeting tentatively arranged for September 8, 1943, for a thorough review of recent facts received for Mr. Cramer's file.

Owing to the fact this case in the past presented a problem when classification was being considered, it is the desire of the board at this time to clarify certain statements which seem to conflict. We are in receipt (September 2, 1943) of affidavits submitted under date of August 10, 1943, by the following persons who are residents of Douglas County with the exception of one: R. L. Dice, Mrs. M. A. Dice, William Noteboom, John Hoekman, William Gruenwald, Roy Folkerts, Dr. George Faber

(Petitioner's Exhibit 1.)

(County of Charles Mix), Edwin Muckey, and William Muckey. Affidavits signed by Edwin and William Muckey were not witnessed by a notary.

Each of these nine affidavits attest to the fact that Mr. Cramer has been working in the field, doing all kinds of farm work personally, and driving a tractor, and the affiants say under oath they witnessed Mr. Cramer in person so engaged.

We are also in receipt of photostatic copies of a Certificate of Farm War Service, and a letter dated June 1, 1943, mailed to Nelson B. Cramer.

In your position of a person granted authority to certify to the production and activities of farmers and their employees, we will ask your further *assistant* in this instance. What explanation can be offered for the reason nine persons state they have seen Mr. Cramer doing the farm work himself, and yet we have a statement saying that Mr. Cramer has never undertaken to do any work whatsoever.

You understand, Mr. De Velder, we are not taking exception to your letter of August 18, 1943, it is only that we are frank to say we are perplexed, and if you can throw some light on the situation, we will appreciate it.

Yours truly,

W. F. Prisk,

Chairman Local Board No. 271



(Petitioner's Exhibit 1.)

United States Department of Agriculture  
U. S. D. A. War Board  
Armour, South Dakota

September 7, 1943

Local Board #271  
Long Beach, California

Gentlemen:

The writer acknowledges receipt of your letter of the 3rd and to say that I am astonished by its content is to put the matter very mildly.

My letter to you was written in an official capacity and was for the sole purpose of discharging the duty I assumed as chairman of the Douglas County U. S. D. A. War Board. I am not authorized to enter into controversies as to facts nor do I feel justified in attempting to disprove anything which may be contained in affidavits procured by the registrant and filed with you.

However, I feel that I can properly point out:

1. That R. L. Dice and his mother Mrs. M. A. Dice, write the insurance on the Cramer properties.
2. William Noteboom operates a gasoline and oil business and is the principal, if not sole, supplier of Mr. Cramer.
3. John Hoekman and Roy Folkerts operate an elevator and buy practically, if not all, grain produced on all of the Cramer farms.
4. William Gruenwald has been engaged in the purchase and sale of livestock for Mr. Cramer.
5. Dr. George Faber is a Veterinarian from Mitchell (50 miles distant from the Cramer farm) and does Mr. Cramer's work for him.

## (Petitioner's Exhibit 1.)

6. Edwin Muckey has rented a Cramer farm, and William Muckey is at *he* present time on a Cramer farm.

Aside from Edwin Muckey and William Muckey, all of the persons above named reside at least 13 miles away from Mr. Cramer's farm and could not have had very many opportunities to observe his farming operations.

As previously stated, I am not in a position to enter into any controversy as to whether the statements I have made are truthful facts or not but if you wish to find out for yourselves I would suggest that you write to Mr. Cramer's neighbors, and I accordingly herewith submit a list of neighbors, living within one and one-half miles of him, viz:

Henry Poelstra	Corsica, South Dakota
Dick Vanderpol	" "
John H. Teeselink	" "
Elmer Schipper	" "
Verne Beukelman	" "
Marion Van Zee	" "
Ray Beukelman	" "
Earl Van Den Hoek	" "
Arie E. Van Zee	" "
E. A. Van Zee	" "
Peter Westra	" "

Yours respectfully,

Isaac C. De Velder,

Chairman Douglas County U. S. D. A. War Board

[Stamped on Face]:

Local Board No. 271 91

Los Angeles County 037

Sep 10 1943 271

Woodrow Wilson High School  
Long Beach, California

(Petitioner's Exhibit 1.)

United States Department of Agriculture  
USDA War Board

Armour, South Dakota

October 4, 1943

Local Board No. 271

Woodrow Wilson High School

Long Beach, California

Dear Sirs:

Re: Nelson Baker Cramer

We the undersigned members of the Douglas County  
USDA War Board in meeting on October 4th, 1943, after  
carefully investigating and checking his records find that  
in our opinion Mr. Nelson Baker Cramer is not essential  
to the operation of his farm.

/s/ Isaac C. DeVelder, Chm.  
Robert L. Pinnow, Secy.  
S. J. Clarke  
W. H. Bymers

The above action constitutes the unanimous vote taken  
by all board members.

[Stamped on Face]:

Local Board No. 271      91

Los Angeles County      037

Oct 8, 1943      271

Woodrow Wilson High School

Long Beach, California



(Petitioner's Exhibit 1.)

October 12, 1943

Selective Service Board #271

Long Beach, California

Gentlemen:

I wish first to state that I appreciate very much this opportunity to be here and present my case to you personally. I am somewhat handicapped in talking to you for I had no training or experience to guide me, all my young manhood and adult years having been spent either in the business world or on a farm. And so as to condense as much as possible my whole presentation, I have reduced it to writing. After hearing me read it, if there are any questions at all I shall do the best I can to answer them.

I was born on a farm near the city of Syracuse, New York, owned and operated by my father. We raised the usual crops, such as potatoes, cabbage, hay, grain, peas—sheep and cattle, and I there began the experience of practical farming. This continued under my father's guidance until he was murdered on October 31, 1933 (incidentally the man who committed the crime is still in the penitentiary) after which time I continued to make this New York farm my home, save for some incidental employment in the business world and such absence as were required to manage the South Dakota properties.

During the year 1929 a Great Uncle died in Yankton, South Dakota, leaving to my father and me some 2100 acres of land. By an understanding between my father and me, the handling of our joint lands in South Dakota fell to me. And in discharge of that duty I made many trips to South Dakota throughout the years, and spent

## (Petitioner's Exhibit 1.)

lots of time there. After the murder of my father, all of his interests passed to me. The total of these holdings was about 1300 acres plus 214 in New York State.

Beginning in about 1930, a series of draught years commenced in South Dakota and crop failures year after year was the unfortunate result. Thousands of farms were abandoned and it is historically true that farms which had been worth \$100.00 per acre were going unsold at \$10.00 per acre. Taxes, insurance, upkeep and all the expenses of ownership continued. I was forced, therefore, in order to maintain the burden of ownership, to find employment outside of farming and use the money thus earned to retain possession of the South Dakota farms. These activities cover the time from 1933 to 1940. In 1940 rain again came in small amounts to my area of South Dakota.

In the fall of 1940 I began the acquisition of other farm lands near my other farms near Corsica. All in all, I bought five farms, totaling approximately 900 acres between 1940 and 1942. In 1942 I manually started to work 640 acres of the additional land purchased, in addition to my continued management and control of the other properties. I have been since living upon and actually engaged in the manual labor, attended upon raising grain, hay, corn, stock and other food stuff exactly the same as any other active farmer. These plans were conceived and put in operation long before Pearl Harbor, and I assure you that the fact that they culminated in the same crop year as Pearl Harbor was a coincidence, nothing more—nothing less. In addition, I have, of necessity, attended to the leasing, overseeing, and last but not least, financing of the balance of about 2400 acres. It is my intention

(Petitioner's Exhibit 1.)

to so continue this farming and those activities if permitted to do so.

I may call to your attention that for me to make one round trip to all of these farms entails two full days and covering a distance of 300 miles travel.

About 1933, when I was in charge of all our farming operations, I came against one, Isaac C. De Velder, a slightly older man than I, in the farming community of Corsica, South Dakota. Mr. De Velder was just beginning to develop some following in Corsica.

The community of Corsica is quite small and is composed largely of Holland Dutch families of which the De Velder family is one. At the outset of my experiences in South Dakota I was unfortunate in incurring the enmity of the De Velder family, particularly Mr. Isaac De Velder. Perhaps it was my fault, or more likely, in my judgment, it was the universal and quite human jealousy directed towards one who accumulates large land holdings. This enmity of Mr. De Velder grew more pronounced and outspoken as the years progressed. It had been my hope to manage my farms and be let alone, but this proved impossible. When the A.A.A. program came into being, Mr. De Velder was named its administrator. While it interfered greatly with my own desires, I might have gone along under an administrator who was less vindictive in his personal statements to me. In any event, over a period of 7 or 8 years, Mr. De Velder was constantly, by acts and statements, my most active adversary. He would resort to such things as endeavoring to entice my tenants to other lands, has openly stated to me that he and his friends had been running the county for twenty years or more and they would continue to do so, that they



## (Petitioner's Exhibit 1.)

would make me like it, and hoped some time to run me out of the country and take over my farms. Even in the years of the worst crop failures when I was working at other trades to get sufficient money to pay my taxes, insurance, and other expenses, I was harrassed by Mr. De Velder in his private and official capacities in every way possible. However, I had faith in South Dakota and knew that once the cycle of dry years was over the land would again be productive and year after year I watched the moisture developments until in 1940 I felt we were again in the beginning year of a wet cycle. Therefore, in the spring of 1940 I began to acquire land for my home farm. And from the spring of 1940 till the spring of 1942 I acquired, by purchase, approximately 900 acres of additional land as stated, and began to stock these new holdings. I purchase over this period a good strain of pure bred Hereford stock, a good strain of Hampshire hogs, poultry, horses and other incidentals. I also purchased the necessary farm implements to properly cultivate and farm this land. I also purchased in 1940 a small frame building in Corsica, containing a vault to keep the records, from which I endeavored to conduct the many and varied business affairs connected with operation of 3000 acres of land.

There are all told 18 separate farms, each representing a separate business with separate capital investments, cost and income and the accounting, bookkeeping and other details of management, and records, must be kept apart from each other. So it can readily be seen that one central office headquarters for the handling of such records is not only a necessity but is economically sound, and I feel I need not mention that which you know, that the

## (Petitioner's Exhibit 1.)

seemingly never ending reports, surveys, and questionnaires coming to farmers from many different government agencies makes it mandatory on one who is in any degree at all attempting to cooperate with those charged with the responsibility of food production as a war measure, to maintain clear, adequate and comprehensive records in a central location where they are easily and readily accessible. And it must be remembered that the owner of the farms has a responsibility in this matter not too lightly cast aside with a mere statement, such as made by De Velder in his letter of August 18—"That as to such rented lands Mr. Cramer's sole responsibility is the collection of rentals from such tenants and, of course, the customary observation and supervision that any owner of property practices to prevent waste or damage".

It was my practice to work in the field during the daytime, and during the evening hours go to my office in Corsica and take care of the voluminous detail of book-keeping, correspondence and the like—many times working as late as midnight, or after.

While I was aware and only too painfully so of Mr. De Velder's personal animosity, I did not believe that he would permit his personal antagonism to lead him into the pitfall of positive untruths. His statements that, "That at no time during the past two years has Mr. Cramer personally done any farm work whatever himself" and "That at no time has Mr. Cramer displayed any knowledge of farming which would qualify him to supervise the hired men doing the work on such farm", I hereby state clearly and without equivocation, are false, untrue and a deliberate falsehood knowingly uttered by Isaac De Velder through the request of this board for the specific

## (Petitioner's Exhibit 1.)

purpose of enabling this board to disregard the affidavits of reliable citizens and other evidence submitted to you, that the statements were made by him, not only as an individual but as a representative of the Department of Agriculture of the United States with the knowledge that such untrue statements would, as the record shows they did permit this board, in spite of the actual facts to determine unjustly my status as a farmer and hence my unjust reclassification. On the contrary to his statements, I hereby state that I have personally done much of the farm work myself. That the crop records of my 640 acre farm, on which I live, shows that I have displayed knowledge of farming which qualified me to supervise hired men doing work on my farms. Regardless of the outcome of this issue, I have determined that such erroneous, biased and vindictive statements on the part of Mr. De Velder in cooperation with others regarding me, shall not go unnoticed or unchallenged with those authorities having proper jurisdiction of such matters, not only in fairness to myself but also to others who may incur his displeasure.

Mr. De Velder in his communications has by inference suggested that some of those who have given affidavits attesting that I am a farmer have done so through self interest and thus have infringed their integrity. I am happy to present to you herewith a statement from the Governor of South Dakota regarding those whom he knows and from the County Judge of others, that these people are the ordinary men of the mill, God fearing folk, who are the backbone of this nation.

I draw to your attention that about one year ago I was classified as a farmer. If I was a farmer then I am



## (Petitioner's Exhibit 1.)

doubly so now. I farm more land. I have more stock. Based upon the entire file in this case and the matters brought to your attention at this personal appearance, I am firmly convinced that I am of greater benefit to this nation as a farmer, and it is, therefore, the duty of this board to classify me as 2-C.

Let me say I do not fear induction into the armed forces. I, myself, have much to gain and more to lose in this war than many men. I have no trade or skill with which to give my country other than my farms and farming. Food is a necessity. I have no relative by blood or marriage who can take my place in these farming activities and such men can not be hired and obtain for the nation the full well rounded food production which I, with my intimate knowledge of the soil conditions on each farm, can produce. I conceive it to be every man's duty and obligation to fit his own personal problems to the common good. Under this conception of my best contribution to winning the war, I firmly believe it to be in remaining on my farm, operating my other farms and with a fortitude and spirit borne of an honest conviction continue to produce to the best of my ability the food stuffs so sorely needed.

As I have stated, I believe that De Velder's statements in his communication to this board were intentionally misleading, and the reasons, therefore, are quite apparent. If through those misleading and untrue statements from him, as an official, he is able to circumvent the Farmers Draft Act, passed by the Congress of the United States, and thus remove me from the scene of my active management of these farms as well as my own work on my own farm, Mr. De Velder, as Chairman of the Triple



(Petitioner's Exhibit 1.)

"A" of Douglas County, so I understand, can take over the farms which I own in that area and operate them as he sees fit under the guise of producing food for the nation at war. I feel that Mr. De Velder and his associates have a selfish motive in declaring that I am not essential in the working of my farms because in my absence he could do as he saw fit in the handling of my properties, incurring to the benefit of himself and his associates. My experience with De Velder convinces me that if this should come about, the farms would not produce as efficiently and I have no confidence in his financial integrity to adequately and properly operate these farms.

I have finished my statement to you and will answer any questions you care to ask me to the best of my ability.

Yours very truly,

Nelson B. Cramer

Nelson B. Cramer

October 18, 1943

Selective Service Board #271

Woodrow Wilson High School

Long Beach

California

Gentlemen:

Your attention is directed to part 625.2 B of the Regulations of the Selective Service Act from which I quote:

"The registrant may present such further information as he believes will assist the Local Board in determining his proper classification. Such information shall be in writing or, if oral, be summarized in writing and, in either event, shall be placed in the registrant's file."

(Petitioner's Exhibit 1.)

Your attention is called to my letter of October 12, 1943, wherein I respectfully requested the privilege of having present at my personal appearance before your Board a competent shorthand reporter to take down and subsequently transcribe the things said at the time, which request was refused.

I feel justified in believing that from remarks made and from the attitude of some of the members of your Board that these members gave only secondary consideration to the facts involved in properly classifying me as the whole time of these certain members was consumed in accusing me of unscrupulous conduct and in directing vicious accusations and intemperate language toward me.

In order that the things said and done at the time of my personal appearance before your Board shall not be obscured in the record, attached hereto is a summary in writing of such matters as provided in the Regulations.

Kindly place this letter and the attached summary in my file.

Very truly yours

Nelson B. Cramer

[Stamped on Face]:

Local Board No. 271      91

Los Angeles County      037

Oct 18, 1943      271 3:30 P.M.

Woodrow Wilson High School

Long Beach, California

## (Petitioner's Exhibit 1.)

Summary of Oral Matters Presented at Personal Appearance of Nelson B. Cramer Before Selective Service Board 271, Long Beach, California, October 12, 1943.

In company with Miss Dorothy Miller, a stenographer, and Frank Jaques, Attorney, I arrived at the Board offices on Tuesday, October 12th, at about 7:30 p.m., the time set in the notice for my personal appearance. The door was locked and we waited a few minutes. Finally, some gentlemen whom I did not know came and unlocked the door. Several gentlemen were standing on the sidewalk talking together and after a few minutes went into the building. Following, the three of us went in and I presented Mrs. Clavier, Clerk of the Board, with my letter of October 12th requesting that I be permitted to have a stenographic reporter and my attorney there. Mrs. Clavier handed the letter back to Mr. Jaques and apologized for not answering my previous letter of day before because she said it had only been received at four that afternoon, even though I had sent it special delivery. Mr. Jaques handed my letter back to her and stated that I wanted the letter made a part of the permanent file.

Mrs. Clavier then told us that there was another gentleman present and she would let him come in first, as it would only take a few minutes to dispose of the matter. Mr. Jaques said, "We will step outside", and Mrs. Clavier said, "No, that isn't necessary". But nevertheless, we stepped outside. In about five minutes this other gentleman came out and we went in. Mr. Clavier said, "I have just handed your letter to the Board. They have not had an opportunity to read it". We were able to hear

*(Petitioner's Exhibit 1.)*

someone reading the letter and Mrs. Clavier asked us to go outside and we told Mrs. Clavier to tell us when we could come in. In about twenty-five minutes Mr. Prisk, Chairman of the Board, came out and asked where Mr. Jaques was, Mr. Jaques having, in the meantime, gone down to the sidewalk about thirty or forty feet away. Mr. Prisk then told Mr. Jaques it was not the policy of the board to let anybody in the meeting and Mr. Jaques responded that he, personally, had not asked for permission but that I had asked for it. Mr. Prisk said to me, "Then I will tell it to you". "Our Board has made a decision not to allow your reporter and attorney at the meeting." I said to Mr. Prisk that I could not understand it as other Boards allowed this courtesy. Mr. Jaques then intervened and said not to argue with Prisk. Prisk said he would not argue the point as that was their ruling.

Mr. Prisk and I went in the building and went behind the screen where the Board was meeting at about five minutes past eight. The Board was seated with Mr. Prisk at the head of the table, with Mr. O'Brien, Mr. Horner and Mr. Wagner at the left side, and on the other side of the table Mrs. Clavier and Mr. Mc Arthur. I sat at the left of Mr. Mc Arthur. Mr. Prisk said, "Well, gentlemen, we have called this meeting to give Mr. Cramer a personal interview". "And now, Mr. Cramer, if there is anything that you have to say, you can say it now". I remarked that what I had to say I had reduced to writing and if they would permit me I would read it. I gave them four copies of my statement, and I read the statement all the way through with no interruptions. Mr. Prisk took my copy and said, "Is this all you have?" And I said, "I thought of this other after I wrote this state-



(Petitioner's Exhibit 1.)

ment and I would like to read it". And I read what I had typed on a little 3 x 5 card, and initialed it and gave it to Mrs. Clavier who threw it back at me. Later on in the evening I gave it back to her and asked her to please put in the permanent file, and she said, "All right". The card which I read was as follows:

I feel the Board is mistaken and badly so, among other reasons one being that the fact that last summer in a conversation with Mr. Prisk he made the statement that after all he knew what I was doing through my neighbors. On an inspection of the file, I found no statement from my neighbors. I understand Mr. Wagner has likewise correspondence which he states influenced him but which I have been unable to find in the file. I recognize, however, that the real issue in this case is not primarily the prejudice of the Board, but the fact of whether or not I am a farmer and whether or not I am essential to the efficient operation of the same. And in this light, I again hope that you will lay aside your personal prejudice and give weight to the 30 some affidavits of competent citizens vouched for by the Governor and Judge. In the light of the apparent prejudice of De Velder, I believe I am entitled to a 2-C Classification to accomplish greater production as intended by the Act passed by Congress to give those actually engaged in farming activities deferment.

After I had finished reading the statement on the card Mr. Prisk said, "You mean to tell me that I told you things that were not in the file". I said, "I have not been able to find those records in my file". And he said,

(Petitioner's Exhibit 1.)

"What do you mean?" I said, "Mr. Prisk, last summer when I was in your office you made the remark to me that you knew what I was doing from my neighbors up there and that I was not a farmer". And Mr. Prisk said, "You are a God damned liar". "I never made such a remark, and what I say comes from the records and I can prove it, and there is not a grain of truth in the statements that you have made". Mr. Prisk, in the statement about his conversation with me a year ago, said he never made that statement to me and said, "Are you calling me a liar?" And I said, "Mr. Prisk, just a minute". "You made the statement to me last year in your office that you knew what I was doing from my neighbors up there and that, I insist on, as being the truth". And he said, "You are a God damned liar". "I never made such statements to you". And I said, "I am sorry, very sorry, Mr. Prisk, but you did".

Mr. Wagner asked me numerous questions, so did Mr. Prisk as to how I knew I was classified 1-A before I received any official notice or communication from the Board. The Board said they had their meeting on the 10th and I was there on the 14th and that their Clerk handed me my 1-A Classification on the 14th, and I handed her a letter stating I already knew I was in 1-A Classification and they wanted to know how I knew it. Mr. McArthur made some remarks which I did not catch and one of the members said to him, "No, we have asked Cramer questions and we don't want you answering them for him". I said to them that I would have to talk with Mr. Leland Mc Arthur to refresh my memory on that point. That I had made a number of trips to the Board and I was not certain which time I gave Mrs. Clavier

(Petitioner's Exhibit 1.)

the letter she referred to. I told them I was not sure whether I delivered the letter to the Board on my first visit to the Board or later, so before I answered that question I would have to talk to Leland Mc Arthur. Members of the Board then asked me why Leland Mc Arthur was interested and I answered, just to see that I got a fair deal because he felt I had not received one. And one of the Board said, "You realize that he is the son of A. L. Mc Arthur, a member of the Board, and I answered that I assumed as much as the name was the same.

Mr. Wagner asked me how it was that I got the affidavits signed that I was a farmer long before the De Velder letter came in and why I was doing all this to prove that I was a farmer. I replied that there was rumor in South Dakota that "I was in the Army now and had been classified 1-A" and I said, "How it gets out I do not know", and that there were plenty of rumors all over Long Beach and in Douglas County, South Dakota, and it had gotten so that there was nothing personal or private about my business and that all that I had to do was to stick my head out of the window and that everybody could tell me more about my business than I knew myself.

Mr. Horner asked me how it was that I had sent men to see him and try to change his vote. I told him that I had not sent anybody to see anyone to get them to change their vote, that what I wanted was an honest and fair consideration of my case on its merits.

Mr. Horner asked me what interest Tom Gregory had in V-Bar Ranches and was it a fact that he had a \$10,000.00 loan or a \$10,000.00 interest in the V-Bar Ranch. I answered that Mr. Gregory did not have any interest in the ranches and that all the money and expenses that I



(Petitioner's Exhibit 1.)

was put to last year in my reclassification, as expenses of attorney fees, had been repaid.

Horner then asked me how well I knew Stewart Sharp, the County Judge, and M. Q. Sharpe, the Governor of South Dakota. I answered this by saying I had known Judge Sharp for some years and Governor Sharpe since he had become Governor.

Some one of the Board then asked me if Ray Miller did not have an interest in the property. I said that I hardly knew him, that the first time I had met him was in Corsica, South Dakota, that I was going across the street and someone called me, and I turned around and, thinking it was a salesman trying to sell me something, told him that I just learned that one of my barns had been burned, and was on the way to the ranch where it burned and if this man, who called me, whom I subsequently discovered to be Ray Miller, wanted to talk to me he would have to go along. So he got in my Station Wagon and rode to the farm, the scene of the fire.

Mr. Wagner many times returned to the question as to how I knew I was 1-A and said it was a very important point and they had to find out. Mr. Mc Arthur, apparently wanted to get on with the hearing and brought up some other topics with relation to the affidavits filed but Mr. Wagner kept on talking about how I knew I was 1-A.

Mr. Prisk asked me, "Well, didn't you come to see all of us last year and didn't you think that through your meeting us that your overwhelming personality would change our vote and we would give you deferment?" And I said no, I was only hoping for the truth and you would classify me according to truthful statements in the record.



## (Petitioner's Exhibit 1.)

Mr. Wagner pointed to the part in my prepared statement where I brought out the fact of the Board soliciting information from the Board in Douglas County and he wanted to know how I knew that. And he said that he did not have to have any statements or affidavits from Douglas County, that he could see from my statement in my prepared paper that there was not a truthful statement in it. He called me a damned liar several times and once, I am sure, a "God damned liar". Both Mr. Prisk and Mr. Wagner constantly referred to Leland Mc Arthur and wanted to know why he was so interested in my case. And they kept asking me who paid Ray Miller's expenses and also the expenses of the other investigation and they grilled me at some length on the cost of it. I said I had not paid a living soul and was not going to.

Wagner wanted to know how I get here from South Dakota, and said he had driven it many times and knew how long it took to get here and that I was here on the morning of the 14th. I told him I had come on the train and was mixed up on the exact dates.

I had been away from the ranch during the week of December 7, 1941, and all of a sudden Wagner asked me where I was on the morning of December 7, 1941, and then he asked me also where I was on the 7th of July, 1941, which was another of the few times that I had been away from the ranch. I told him that on July 7 I was in New York State closing up a deal for the sale of my property there and either was in New York or on my way back to South Dakota, that I arrived in Corsica about the 15th of July and that I remained there the balance of the summer buying cattle and machinery. I told him that I could not remember the exact date when I came to California

## (Petitioner's Exhibit 1.)

that fall but I explained that I had had Mr. Victor Siebert, an architect, employed to draw up plans for me for farm buildings and a home that I planned on constructing on my newly acquired property in South Dakota. I also told them that as soon as I had these plans from Mr. Siebert I left California and went back to South Dakota with the idea in mind of getting the foundation laid before frost. I also told them that the frost beat me by about a week and I stayed in South Dakota all of that winter taking care of my livestock and preparing for the farm year which was to start in March, 1942. I tried to get in a question to Mr. Wagner as to how he knew that those were the only two times that I had actually been away from South Dakota and my ranch property for many months, but was constantly interrupted by other questions and never got an answer from Mr. Wagner to that one.

Mr. Horner was quite persistent in his questions about Tom Gregory being interested in my farms. I told him that it was all news to me and said, "I am again finding out more about my business than I know myself". "Who gave you that information?" Without answering, Mr. Horner said, "I asked you, wasn't Tom Gregory interested in your farms and didn't he have \$10,000.00 invested up there?" I answered, "No, he never did have."

During the entire evening many things came up about the matter of my reclassification a year ago. Someone said, I think Mr. Mc Arthur, that somebody had written over his name to the draft board in Douglas County about me and my farming activities. And an argument ensued as to how I got classification 2-C and Mr. Mc Arthur said it was after it went up on Appeal and I said I

(Petitioner's Exhibit 1.)

thought I got it from Colonel *Leach*. No one of the Board referred to the actual file to ascertain any facts during the entire hearing.

Wagner then asked me how I was introduced to Colonel *Leach* and how many times I had seen him and I answered, "Only one, that was when I was in his offices in the fall of '42", and he asked me, "Who introduced you?" I told him that I walked in on my own in the fall of '42 when I had made a trip to Sacramento. He repeated this question to me in several forms during the evening, but I was always able to answer him truthfully that I had met Colonel *Leach* and nobody had taken me and introduced me. During the course of the questions and answers with Mr. Wagner, he asked me how I knew he had received communication from up there and I answered, "That is common gossip, both up there and down here, and furthermore, did you not go to school with James Bandy in Huron?" He hesitated before answering and said, "Well I used to live there". And I said again, "Didn't you use to go to school with James Bandy?" And with considerable heat he said, "If anything he used to go to school to me. I was his teacher".

Mrs. Clavier asked me many questions, but they were mostly confined as to how I knew I was 1-A before she handed me a letter stating the Board had met and reclassified me. I repeated again and again that I would have to talk with Leland McArthur as to which visit to the Board it was.

I kept waiting for them to ask me about my farming activities for that was what I was there to talk about as well as to try and show them why De Velder and his



(Petitioner's Exhibit 1.)

gang were out to get me. Nobody at any time asked me a single question about my farms or what I was doing.

After I had finished reading my speech I handed Mr. Prisk the letter from the Governor of South Dakota and also the one from Judge Sharp, testifying to the integrity of the men and women who had made affidavits on my behalf. Mr. Prisk read these to the Board and when he came to Judge Sharp's letter which listed some twenty names whom Judge Sharp knew, Mr. Prisk said, "There are some twenty names of people here whose affidavits we already have", and handed it over to Mrs. Clavier to file.

Mr. Horner or Mr. Wagner, or both of them, said that they would classify me as 1-A without the De Velder letter and Wagner asked me, "How did you happen to start and get all of these affidavits coming in at a date prior to the De Velder letter?" I replied, "I received notice which was undated stating that my case was up for re-classification. I filled out Form 42-A and had Form 42-B filled out which I sent to the board", then having heard nothing from them I figured that there was still a question about my status. And I told them that I knew that there would probably be letters attacking me so I decided to get the affidavits of people who knew what I was doing. I told them that I was busy at the time threshing but that as soon as I could take the time I began to go around and get the affidavits and as fast as they were prepared I sent them on for filing. I told them that these affidavits were obtained in several different locations at different times and that I had no way of knowing for sure about the De Velder letter until I got here and saw it in my file. I told them that because I had heard nothing about my



(Petitioner's Exhibit 1.)

status I had concluded to come to Long Beach and find out about it. That as soon as I was able to leave the farm work I did come.

The question was again brought up, "How did I know that I should send those in?" "How did I know there was any question in the Board's mind?" I kept trying to explain to them that not having heard anything and knowing the viciousness of De Velder's tactics as Chairman of the War Board, I felt that I should do something to offset his activities which I felt sure he would pursue.

One of the things that came up was the fact as to whether or not this Board had ever consulted the Draft Board in South Dakota. Mr. Prisk said, "These rulings of this new letter we are going by just came out recently and we could not have written them". I told them that I thought the point was that in 1942 this Board did write to the Local Draft Board in South Dakota and finally all members of the Board agreed that they had written in '42. Mr. Wagner stated and Mrs. Clavier agreed that they did not pay any attention to that letter and that they had classified me without any reference to it. Mr. McArthur told them that that was not the way of it and that they had classified me 1-A. And I said that the only way I got my 2-C on Appeal was through Colonel *Leach*. Mr. Horner and Mr. Wagner both spoke up and said "Colonel *Leach* did not give you the 2-C, we did". Mr. O'Brien said, in effect, that the Board gave me the 2-C but that it did not come from Colonel *Leach*. Then Mr. Wagner again went back to the question of how I knew Colonel *Leach* and how I had met him.

The whole evening was spent on how I received information that I was 1-A before I got official notice and

(Petitioner's Exhibit 1.)

also how I knew that the Board had written to Douglas County for information and why the affidavits stating that I was a farmer came prior to the De Velder letter. Both Mr. Horner and Mr. Wagner kept asking me if I had not been receiving inside information and I told them, "No". And Horner spoke up and said "Maybe he just thinks he has been receiving some".

Finally, at the end of the evening Mr. Mc Arthur said, "Gentlemen, we don't seem to be getting anywhere on this. The real issue is which of these affidavits are we going to take as authentic". And someone said, "That is right". Then Mr. Prisk asked me if there were any further statements and I told them I did not think so.

Mr. Prisk then said to the members of the Board, "Are there any more questions?" and Wagner said, "I have more questions, but what is the sense of asking them—I don't get the answers".

Mr. Wagner, in discussing my prepared statement, and the part about the Board writing to South Dakota which would aid them in unjustly reclassifying me, said that this was all a lie and that by itself it would break down my whole structure.

Somebody asked me why I was putting up such a fight. And I said that I simply was fighting to protect what I had lived and fought for and to preserve what I had lived and fought for all my life. Some members of the Board said I was sending in these affidavits before I was reclassified and stated that, in effect, at that time that there was no information in the Board about me being reclassified, that it had not been talked about. Mr. Mc Arthur spoke up and said, "You know it is not that way". "This

(Petitioner's Exhibit 1.)

has been the hottest topic since he registered and it has been discussed at nearly every Board meeting”.

I, Nelson B. Cramer, hereby certify that the foregoing statement is, to the best of my knowledge and belief, a full, true and complete summary of all of the conversation and of the things done and said by the members of the Board and myself at the time of my personal appearance on the evening of October 12th, 1943, at the offices of the Local Board No. 271, Long Beach, California.

Nelson B. Cramer

Nelson B. Cramer

[Written on Face]: Rec'd Oct. 18, 1943 3:30 P.M.

## SELECTIVE SERVICE SYSTEM

Local Board No. 271

Los Angeles County

Woodrow Wilson High School

Long Beach, California

October 20, 1943

STATEMENT OF PERSONAL PRIVILEGE BY W.  
F. PRISK, CHAIRMAN SELECTIVE SERVICE  
BOARD NO. 271 PERTAINING TO CHARGES  
MADE BY NELSON B. CRAMER.

Members of Selective Service Board No. 271  
Long Beach  
California

Gentlemen:

As a matter of personal privilege I request that this letter be placed in the file of Nelson B. Cramer, a registrant of this Board, in refutation of false and mislead-

## (Petitioner's Exhibit 1.)

ing statements which he has made in writing and in personal appearance before this Board, reflecting on the integrity of myself and other members of Selective Service Board No. 271.

Mr. Cramer has seen fit to file a lengthy statement as to his version of what happened at the meeting of our Board the evening of October 12th. It is questionable if his communication is admissible as evidence but personally I favor its inclusion as a part of the record, regardless of its many inaccuracies of statement.

In his statement which he read to this Board Mr. Cramer stated: "Mr. Prisk, last summer when I was in your office you made the remark to me that you knew what I was doing from my neighbors up there and that I was not a farmer." Mr. Cramer did call at my office and it was my impression until he made his statement to this Board that the interview was a friendly one. I recall that I told him our Board did review all the evidence that was contained in his file and made its decision accordingly.

Mr. Cramer made a false statement of fact when he charged I made the remark he attributed to me. I could not have made it for the reason I had no information as to the attitude of his neighbors, had no correspondence with them, and there was nothing in our files to reflect the feelings of his neighbors.

Remarking to Cramer that there was not a grain of truth in his charge he refused to withdraw it, and it was



(Petitioner's Exhibit 1.)

at this juncture I called him a "damn liar", but I did not blaspheme and call him a "God damned liar" as he states in his latest communication which he is asking to have incorporated in our records. I believe our clerk and other members of this Board will verify my statement.

In all humility I wish to apologize to the members of this Board for having given utterance to the unfortunate words which never should have been used by your chairman. At the time there was also flashing through my mind the charges made by Cramer that the chairman of the County War Board, to whom we had appealed for information, was violating his oath of office and trying to get control of his (Cramer's) property, that he charged this Board with prejudice and unfairness, and for a moment I lost control of myself.

I am sure the members of this Board will remember that months after the interview in my office I voted to place Cramer in a II-C classification. This I feel gives the lie to his charge that I was prejudiced against him. There was a doubt in my mind at the time as to whether Cramer was entitled to II-C but I gave him the benefit of the doubt and he was so classified. Later a directive told us when in doubt we should ask the County War Board nearest a man's property and familiar with all the facts for guidance. This was done. The County War Board reported (all members signing a statement) that Cramer was not an essential man in the farming industry and I voted to classify him I-A. Two other members of the

(Petitioner's Exhibit 1.)

Board voted the same way and he was so classified by a vote of three to two. I do not feel it is necessary or desirable for me to go into a further discussion of the issue, for it will be decided on its merits by the Board of Appeal.

In justice to myself and other members of this Board I wish to say we have "leaned over backwards" in giving every registrant a "square deal". This has surely been true in the case of Mr. Cramer. We have devoted hours and hours to his case, reading the many affidavits and every bit of evidence he has submitted, including long communications criticising our actions.

This Board has always interpreted to the best of its ability instructions laid down for us to follow. Different interpretations were placed on the directive as to admission of Mr. Cramer's stenographer at the last meeting. The majority felt records of meetings are the confidential property of Selective Service and they so voted. In his appeal Mr. Cramer has a right to allege we erred if that is his conviction.

I very definitely feel Mr. Cramer's charges of unfairness and prejudice should not be allowed to go unchallenged hence the writing of this letter for our files.

Sincerely yours,

W. F. Prisk  
Chairman Selective Service  
Board No. 271

WFP:NEB

(Petitioner's Exhibit 1.)

Long Beach, California  
October 21st, 1943

To: Selective Service Board, No. 271  
Woodrow Wilson High School  
Long Beach, California

From: Jack Horner, Member Selective Service Board,  
No. 271

Subject: Statement of personal privilege, in refutation of certain untrue statements and incorrect claims made by Nelson B. Cramer in a communication signed and filed by him with Selective Service Board, No. 271, and entitled: "Summary of oral matters presented at personal appearance of Nelson B. Cramer before Selective Service Board 271 Long Beach, California, October 12, 1943".

Gentlemen:

Mr. Nelson B. Cramer, registrant with this Board, has filed with the clerk of this Board a signed but not sworn to statement of what he claims were in substance the remarks made by me, him and other members of said Board on the evening of October 12th, when he was accorded a justly entitled opportunity to appear personally before the entire Board and offer any evidence or make any statements which he cared to in connection with his request for deferment from military service on the grounds of occupational status.

I have read Mr. Cramer's above-mentioned statement carefully and in full. I find therein many statements which are untrue, and because I feel that such statements of his definitely reflect on the integrity of myself and the ma-



(Petitioner's Exhibit 1.)

jority of the other members of said Board, I am filing this statement as a matter of personal privilege; and with the definite recommendation, if possible and permissible under Selective Service rules and regulations, that a thorough and sweeping investigation of this entire case be made by duly authorized officials outside the membership of said Board. I make this specific request because throughout his verbal remarks and in his written statement, Mr. Cramer accuses the members of Selective Service Board No. 271 of being "prejudiced" and "unfair". Inasmuch as this is a direct accusation against an agency of the U. S. Government; and because, if true, the members of said Board guilty thereof should be removed from office, I don't think such a charge should be allowed to go unproved.

At the outset, I desire to state emphatically and in refutation of Mr. Cramer's direct and implied remarks, both written and verbal, that I am not now and that I never have been in any manner prejudiced against him or his claims for deferment. I have viewed his entire case solely on what I conscientiously felt were the merits thereof, and based my vote on statements and evidence which are a part of his official "file".

However, after meeting him, personally, for the first time on the occasion of his appearance before our Board on the evening of October 12, and after reviewing the contents of his official "file", it is my opinion that he is suffering from a definite "persecution complex"; and motivated thereby, that he has unjustly and falsely accused me and other members of said Board of making statements which he either knows are untrue or are figments of a distorted imagination.



## (Petitioner's Exhibit 1.)

Thruout his written statement and verbal remarks Mr. Cramer made several untrue and incorrect statements but I am interested in answering only those few which pertain to myself and to one specific charge which Mr. Cramer made against W. F. Prisk, chairman of the Board.

Therefore, for the sake of the official record and for the study by any authority which may investigate or review his case, I am setting forth hereinafter an accurate summary or verbatim statement of exactly what I said at the Board meeting on October 12th when Mr. Cramer was present to restate claims for deferment. Any statements attributed by Mr. Cramer to me and not specifically corrected or answered in the following contents of this communication are untrue and incorrect.

First, Mr. Cramer has accused Mr. Prisk of calling him "a God damned liar". Mr. Prisk did not use the word "God". Provoked and irritated, justifiably in my opinion, by Mr. Cramer's evasive and irritating attitude, Mr. Prisk did say to Mr. Cramer: "You are a damned liar".

Second, Mr. Cramer has taken exception to many of the questions which he claims were asked him by me and other members of the Board, and infers in his written statement that none of the questions asked him were relative or pertinent to his case. I think that all questions asked by me and most of the questions asked by other members of the Board were very pertinent to his case and offer the following explanation for accurate review thereof.

Mr. Cramer has taken exception to the case which was asked him as to the status in his case of Leland McArthur, son of A. L. McArthur, member of the Selective

(Petitioner's Exhibit 1.)

Service Board No. 271. I was personally interested in an answer to this case because thruout the various proceedings in Mr. Cramer's case, it has been evident to me and to other members of the Board that Mr. Cramer had been advised in advance of his official notification of the action taken by said Board, apparently by someone familiar with or having access to the proceedings of the Board. Mr. Cramer was asked if he knew that Leland McArthur, who visited the Board headquarters in his behalf, was the son of a member of the Board. His reply was that he "assumed" such relationship because of the similarity of the two names and that Leland McArthur appeared in his behalf because he didn't think he (Cramer) was getting a "fair deal".

Mr. Cramer has repeatedly emphasized in his written and verbal statements that certain members of Selective Service Board No. 271 have been prejudiced against him by "neighbors" of his in South Dakota. This is not the case, as far as I am concerned, I repeat, that I have never been prejudiced by anyone and the only information which I have had access to to guide me in determining Mr. Cramer's status came from official sources and to which the Selective Service rules and regulations have directed our Board to contact when any doubt arises as to the status of a registrant making claims for deferment on the grounds of occupational status; and from letters filed with the Board by Mr. Cramer himself.

I wish to state emphatically that I have never been contacted by anyone outside of the membership of Selective Service Board No. 271 and its staff about Mr. Cramer's case with the exception of two persons: namely, Tom

(Petitioner's Exhibit 1.)

Gregory, head of the Long Beach Federal Savings and Loan Association; and Ray Miller, former managing editor of the Long Beach Independent.

Inasmuch as Mr. Cramer in his written statement has elected to question the propriety of questions which I asked regarding the status of these two gentlemen in his case, and has further mis-stated both my questions and his replies thereto, I want to justify such questions and state exactly what he said and what I said in connection therewith.

Several months ago Mr. Gregory called me on the telephone and asked me if he might talk to me personally. In our conversation he explained that it was about Mr. Cramer's case pending before our Draft Board. I advised Mr. Gregory that I would much prefer to discuss such matters only in an official capacity at our regular draft board meeting but that if he insisted I would grant him the courtesy of an interview. Accordingly, he came to my office the same day and before discussing any phase of the matter with him I further explained that anything I might say during the discussion would have to be considered by him purely personal and could not be construed by him as committing the rest of the Board members or myself as to any action which might be taken by the Board officially.

On that basis Mr. Gregory explained his interest in the matter and at this time I wish to state that there was nothing objectionable or irregular in Mr. Gregory's conversation with me at that time.

In substance, Mr. Gregory stated that Mr. Cramer possessed an unfortunate personality and apparently had



## (Petitioner's Exhibit 1.)

made several enemies in South Dakota where he owned large farm holdings. He further stated that he felt and Mr. Cramer felt that certain "enemies" of Mr. Cramer in South Dakota might try to prejudice our Draft Board against him. In the course of our conversation I asked Mr. Gregory what his interest in the case was and he frankly admitted to me that his company had loaned Mr. Cramer a large sum of money and that he was interested in protecting his investment which might be jeopardized if Mr. Cramer were drafted.

At the Board meeting on October 12th when Mr. Cramer was present for an investigation, I asked him what Mr. Gregory's interest was in his case. At first he evaded a direct answer and I told him that "you are not answering my question". I did not ask Mr. Cramer why *had* had sent anyone to see me to "change my vote"; neither did I say anything about "men". I explained to him Mr. Gregory's visit to me in my office and again asked him for an answer. Finally, Mr. Cramer denied that Mr. Gregory had ever made a loan on his property.

Mr. Cramer in his written statement also has stated that someone at the Board meeting on October 12th asked him "If Ray Miller did not have an interest in the property?" I was the member of the Board who asked him about Ray Miller, but I did not say anything about an "interest in the property". I simply asked him if he had sent Ray Miller back to South Dakota to make an investigation of his case. Mr. Cramer again avoided a direct answer to my question, stating that he "hardly knew" Ray Miller. I asked Mr. Cramer this question because a written report made by Miller after visiting South Da-



(Petitioner's Exhibit 1.)

kota in Mr. Cramer's behalf, had been filed as a lengthy document with the members of Selective Service Board No. 271, and such document still is a part of Mr. Cramer's official file. I was interested in Mr. Miller's status because it also refers to the fact that Mr. Cramer has "enemies" in South Dakota. Inasmuch as Mr. Miller's signed statement in the official file of Mr. Cramer was submitted in Mr. Cramer's behalf, I was interested in checking up some of the statements made therein.

Several months ago, following Mr. Miller's return from his investigation of Mr. Cramer's case in South Dakota and after he had filed with our board his written report thereon, I talked to him about the case. Mr. Miller is a cousin of mine and the conversation I had with him took place while we were having luncheon together. He did not attempt to prejudice me for or against Mr. Cramer; but he did explain that he had been well paid to make the trip to South Dakota in Mr. Cramer's behalf.

I would like to clear up and explain one more question which I asked Mr. Cramer during his hearing before our Board on October 12th. I made this statement after he had questioned the fairness of the members of the County War Board where his farms are located in South Dakota and had accused the chairman thereof of being prejudiced against him; and after Mr. Cramer had referred to the number of affidavits which he had filed with the board relative to his status by other citizens of South Dakota. I simply asked him if it wasn't a fact that these persons

## (Petitioner's Exhibit 1.)

had a personal interest in his case because of business relations with him. He admitted that practically all the persons signing such affidavits did have business relations with him and countered with this remark: "Who else would be better qualified to know about me than people with whom I am doing business?"

In conclusion, because Mr. Cramer has persisted in accusing certain members of Selective Service Board No. 271 of being "prejudiced and unfair" in his case, I wish to state that so far as I am concerned, the members of this Board only followed official rules and regulations when they wrote to and considered the reply from the members of the County War Board, where Mr. Cramer's property is located, relative to his status as a bonafide farmer.

Jack Horner

Member Board 271

[Stamped on Face]:

Local Board No. 271      91

Los Angeles County      037

Oct 21, 1943      271

Woodrow Wilson High School

Long Beach, California

(Petitioner's Exhibit 1.)

SELECTIVE SERVICE SYSTEM

LOCAL BOARD No. 271

Los Angeles County

Woodrow Wilson High School

Long Beach, California

November 1, 1943

STATEMENT OF PERSONAL PRIVILEGE

To: Selective Service Board No. 271

From: Clarence E. Wagner, Member Selective Service  
Board No. 271

This is to state that I have read Mr. Cramer's communication, which was filed October 18, 1943, and proposes to set forth the happenings at time of his personal hearing on October 12, 1943, and I desire to give answer to certain statements of Mr. Cramer's.

I refer specifically to Mr. Cramer's statement that Mr. Prisk called him a "God damned liar". This accusation is entirely false. Mr. Prisk did not use profanity. At the time Mr. Prisk challenged the veracity of Mr. Cramer's statement that he had said in the summer of 1942 that "I know what you are doing from your neighbors", he denied making such a statement. Thereupon Mr. Cramer insisted that he did. Then Mr. Prisk said: "If you say that I said so, you are a damned liar", thereby giving em-

(Petitioner's Exhibit 1.)

phasis to a repeated denial of having made such a statement.

I also wish to deny that at anytime during the interview with Mr. Cramer did I call him a "damned liar", or a "God damned liar".

Mr. Cramer refers to my questioning him about his whereabouts on certain days, namely December 7, 1941, and July 7, 1941. I did ask Mr. Cramer about his whereabouts on December 7, 1941, and where he was during the summer of 1941; the growing season of 1941. I also asked Mr. Cramer what were his particular activities during that growing season. Mr. Cramer refused to give an answer to either of my questions, stating he could not remember.

Mr. Cramer has surprising ability to remember certain incidents, as his communication discloses, and yet could not seemingly, remember anything that would provide the answer to inquiries pointedly asked him.

The purpose of my questioning was entirely pertinent to the discussion for the reason that Mr. Cramer's status as a farmer was being questioned, and an attempt was being made to bring out facts that would or would not qualify him as a farmer. Although an owner of a vast amount of farm land, and according to figures, the finest crops in many years in the state of South Dakota had been obtained in 1941, Mr. Cramer failed to remember where he was in



(Petitioner's Exhibit 1.)

1941, and had seen fit to let this year go by without exerting any effort or talent as a farmer.

My particular interest in the date factor hinges on the knowledge that during a large portion of the growing season of 1941, Mr. Cramer was classified as I-A-H.

In Mr. Cramer's summary of oral matters presented at personal appearance before Selective Service Board No. 271, he mentions that at no time was he asked a single question about his farms or what he was doing. Mr. Cramer's failure to answer questions regarding his whereabouts at certain times, caused the fact to become apparent that it was futile to try to determine his status as a farmer. Therefore, no more questions on this subject was asked by me. In closing I wish to add that I find Mr. Cramer's summary filled with inaccuracies, half truths, and falsehoods, and much innuendo. It is not at all a credible document.

Clarence E. Wagner  
Member

[Endorsed]: 12/30/43.

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 31st day of December in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable Ralph E. Jenney, District Judge.

In the Matter of the Petition of

NELSON B. CRAMER

For Writ of Habeas Corpus.

No. 3319-RJ Civil.

This matter coming on for further hearing on Writ of Habeas Corpus; Philbrick McCoy, Esq., appearing as counsel for the petitioner, Nelson B. Cramer; James M. Carter, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; and James J. Marquardt, Court Reporter, being present and reporting the proceedings:

Attorney McCoy requests permission to withdraw Petitioner's Exhibit No. 2 and, in lieu of admitting exhibit, to read portions of the said exhibit into the record, and it is so ordered.

The Court makes a statement. It is ordered that the said Writ be, and it is, quashed, and that proceedings herein be, and they hereby are, dismissed, and that the applicant be remanded to the authority and control of the military authorities.

[Title of District Court and Cause.]

JUDGE'S DECISION.

Los Angeles, California.

December 31, 1943.

Appearances:

For the Plaintiff: Charles H. Carr, United States Attorney, by James M. Carter, Assistant United States Attorney.

For the Defendant: Philbrick McCoy, 1015 Spring Arcade Building, Los Angeles, California.

Los Angeles, California, December 31, 1943. 11 o'clock A. M.

\* \* \*

The Court: I have given this matter careful consideration and, as I indicated yesterday, have willingly given much more time to oral argument than is my custom, because the oral argument was interesting to me and I have felt that a case of this kind was of the utmost importance, involving the freedom of action of any man, and more important than cases possibly involving simply dollars. I have not had an opportunity to write any written opinion or any formal opinion, nor do I think that legal literature would be enriched by my so doing. I shall simply discuss this entire matter very informally and largely thinking out loud and possibly disconnectedly to meet the various points that have been raised.

I think it is quite important that we get our bearings. When the United States was attacked by the sneak attack on Pearl Harbor, unjustified and for many, many decades unknown to the civilized world except by the same nation,

it became necessary for the Congress to act promptly for the defense of the nation. The Congress, in the exercise of what I deem to be its constitutional power, set up what was known as a Selective Training and Service system. Under that system, feeling that the executive branch would be better able to carry out the intention of the Congress, the Congress directed or delegated to the Executive branch the power and responsibility of setting up a system to provide the necessary manpower. In each particular district was organized what is known as a local draft board. That draft board had primary responsibility for the carrying out of the provisions of the Act. That board consisted of men who were familiar with the neighborhood and who were men of responsibility and men whose integrity was what might be desired in the community. Appeal boards were set up and on these appeal boards were placed men, generally speaking, of wider experience. Quite frequently and, in fact, usually the appeal board contained some lawyer of recognized standing and, generally speaking, these appeal boards were there to safeguard the rights of the individual, to see that injustices were not done and that the local draft boards were not guilty of improprieties in their conduct. Generally speaking I think the plan has worked in an exemplary way. A Director of Selective Service was set up in each given territory who had certain general supervision, certain advisory powers and certain functions as provided by the Act.

Now, not every man could, under the law or under the regulations as they were promulgated, be arbitrarily classi-



fied, and I think we should take the time to discuss the law and regulations briefly. Section 5 (k) of the Act provides:

“Every registrant found by a selective service local board, subject to appeal in accordance with Section 10 (a) (2), to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained: Provided,” and so forth.

Now you will note from that provision of the law that just because a man claims to be a farmer or because John Doe or Richard Roe or both of them might classify him as a farmer, does not exempt him from the Act. He may be classified so as to have him deferred in the event the local board finds him (1) necessary to and, conjunctive, (2) regularly engaged in an agricultural occupation or endeavor, and so forth. Now, Regulation 622.25 provides:

“(a) In Class II-C shall be placed any registrant who is found to be necessary to and regularly engaged in an agricultural occupation or an agricultural endeavor essential to the war effort.

“(b) A registrant placed in Class II-C shall be retained in that class so long as he is necessary to and regularly engaged in an agricultural occupation or an agricultural endeavor essential to the war effort and until a satisfactory replacement in such agricultural occupation or agricultural endeavor can be obtained.”

Sections (c) and (d) I need not read.

Section 621.7 provides:

“(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.

“(b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.”

which indicates that the boards are not held to the strict rules of evidence which are sometimes required to be followed in courts of law.

An appeal is, of course, provided for to the appeal board, and Section 627.12 provides:

“The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.”

In Subdivision 627.13 appears the following:

“If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a sum-

mary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision."

Section 627.24 provides:

"(a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, no information shall be considered which is not contained in the record received from the local board and the decision of the board of appeals shall be based solely thereon."

Section 627.26:

"(a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant."

providing that the board of appeals shall not give consideration to Class IV-F because of physical or mental disability. It provides in

(c) "If the board of appeal deems it to be in the national interests and necessary to avoid undue interruption, may recommend to the State Director of Selective Service a postponement of induction."

In Section 627.51 there are certain provisions with regard to special appeal in agricultural cases, and it says 627.61:

"When either the Director of Selective Service or the State Director of Selective Service deems it to be in the national interest or necessary to avoid an in-

justice, he may, at any time, request a board of appeal to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request, a board of appeal will reconsider its determination in any case.

(b) At any time within ten days after the date when the local board mails to the registrant either a Notice of Continuance of Classification (Form 58) or a Notice of Classification (Form 57),” and so forth,

or at any time before the Order of Induction is sent,

“may prepare and place in the registrant’s file a recommendation that the State Director of Selective Service either request the Board of Appeal to reconsider its determination or appeal to the President.” and so forth.

Section 641.5 says:

“The Classification Record (Form 100) shall be open to the public at the local board office. It shall be the duty of each registrant to keep himself informed of his status, and any entry concerning him on the Classification Record (Form 100) shall constitute due legal notice thereof to him and to all other interested persons.”

For the present I just desire to call attention to those particular sections.

Now it has been my view, and I still adhere to that view, that when a registrant has perfected an appeal to the appeal board or caused the same to be perfected for him, that the only thing before me for consideration on



the habeas corpus proceeding would ordinarily be the action of the appeal board, that having superseded the action of the local draft board. In this case, in order that the question may be decided without undue delay and in order that the record may be entirely before the Circuit Court of Appeals or the Supreme Court, in the event that those bodies are called upon to pass upon the question, I have permitted the record to go in and have given it very careful consideration on its merits, and the record is here so that he who wants may read, and the case may not be sent back for further trial, in all probability, on that ground.

Now, you will note here that the regulations contemplate and provide for several safeguards for the interests of the individual registrant: First, the hearing before the local draft board; second, the appeal; third, the interest, advice and functions of the Selective Service Director; fourth, the appeal to the President under the conditions indicated in the Act; and, fifth, not attempting to be exclusive in my categories, the right of the military authorities to make an investigation after the man has been inducted in order to satisfy themselves as to what has taken place. Now in this case the registrant's position has been the subject of a very considerable amount of consideration, apparently, by the local draft board, by the Director of Selective Service, and by the appeal board. It is true that the law provides for a summary to be sent by the local draft board to the appeal board of those facts which are not contained specifically in the written record. In this case the registrant made the summary himself. Of course the law doesn't contemplate that the draft board shall do an unnecessary act, and three of the members of

the draft board wrote what they called privileged communications, which denied, in part, some of the facts set forth in the summary. The contention of counsel for the registrant is that the registrant had a right to have the file sent to the appeal board in the condition in which it was at the time that the summary was filed by the registrant, and he relies, to some extent, in that upon this case of *U. S. vs. Cole*, in the District Court of Delaware. The findings of the Court there I believe to be *obiter dicta*. I am not sure that I agree with the decision even under the circumstances indicated in the opinion, but, even so, I do not feel that it is applicable here. It seems to me that the applicant should have known that when he made such serious charges as he did in what he described as his summary, that some, at least, of the members of the board would not take it lying down, and that they would feel that they should at least file a formal denial. That is a part and parcel, as I consider it, of the summary which the law contemplated.

Now we must look through form to substance in all of these things. Naturally these lay boards—the local draft boards, and sometimes the lay members of the appeal boards—are not technical lawyers. They are not required to respond to precedents and the rules of evidence as do the formal courts. Seldom do administrative bodies consider themselves bound by those technical requirements which are recognized in formal courts of law. Taking it by and large I think that the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated.

Now the local draft board is presumed, under the law, to have given the registrant a fair hearing; a fair and impartial hearing, we may say. When one charges a board with being arbitrary and capricious, that is, of course, a serious charge against public officials. If true they are not qualified to act, certainly in the particular case. If untrue it is a serious charge, and it must be proved in a reasonable manner. Here the registrant was not arbitrarily denied a hearing. As a matter of fact he was given, apparently, every opportunity to make his case or given every reasonable opportunity to make his case. The draft board evidently were very conscientious in their investigation of the matter. They tried to follow that which has subsequently become common practice, to secure information from the community in which the registrant lived. Now I believe the tendency under the regulations is to send these extra-territorial registrants or these registrants out of their normal territory back to the place where they lived, so that their neighbors may pass upon their qualifications. It is perfectly apparent from the wording of the Act that we are not bound by strict rules of evidence because certainly information coming to the board from these sources is what we generally term, in legal parlance, hearsay evidence.

As I indicated to you in reading the Act, the appeal board considers matters *de novo* under the Act, takes everything that has been produced, including that evidence which the local draft board has rejected, and gives it careful consideration. The appeal board is generally an intelligent board of experience. This type of body knows the difference between argument, conclusions and facts. The contention is made that certain letters sent



up to them by the local board were prejudicial. I don't think they would be considered prejudicial in a court such as this, and I don't believe that the appeal board would be prejudiced by them. I think the appeal board would very quickly separate the wheat from the chaff and would take out of it what they properly might, without being too technical.

You must understand that it is not a legal right for a man who considers himself to be a farmer to be exempted or to be deferred from the draft. The law does not so provide. The law provides what the draft board shall do in arriving at a classification. I think, as indicated by counsel for the Government, that the draft board is entitled to consider and manifestly does consider the bona fides of the contention that under the provisions of the law the registrant is necessary to and regularly engaged in an agricultural occupation. Now these boards are sometimes called upon to consider what the man did before war broke out, what his training has been, whether he looks like an urban dweller or looks like a man who is engaged in and has been engaged for some time, in farming occupations. They would naturally be interested in that in determining whether the registrant is really a slacker and is simply using the claim or making a claim to being a farmer in order to avoid being inducted into the military or naval services. They have a right to consider and undoubtedly do consider under certain circumstances the reason why a man has his classification made outside of his normal habitat, whether he was pretty sure that his neighbors wouldn't classify him as a farmer—because they would feel that he wasn't under the Act to be deferred—and why, therefore, he felt



that it was advantageous to him to go many thousands of miles or many hundreds of miles away for his classification. They would possibly take into consideration the fact that in his first classification he claimed to be a conscientious objector. Whether he actually intended to do that is beside the point. They would have before them the record in determining whether there was bona fides about this present contention. They would possibly take into consideration in any applicant the conflicting or irreconcilable claims made by the registrant as to his past or present activities, as to just why he was necessary to or essential to the war effort in the production of food. They might possibly take into consideration as to whether, in the farming of the type in which he was engaged, it was necessary to have a gentleman overseer or someone who didn't actually get his hands calloused by work, whether or not the man did actually do work, whether he was required to help in the production of food, etc. They have certain quotas that are necessary to be raised, and while the regulations provide that that shall not influence their judgment, they have to take into consideration, in determining who are necessary for what, the requirement for manpower in the various categories; and I presume that that is only natural.

I am only raising these points, not to show that they are pertinent here or that I have arrived at any conclusion on any of them, but to show that it is not just simply a question, "Are you a farmer?" "Yes." "Good-bye." There is a lot more to it than that.

Now I have shown you that under the law, under the regulations the Director of Selective Service has a pretty

broad function, and he and the local board and the appeal board are so tied together in carrying out the requirements of the Act that sometimes they are working consecutively, sometimes they are working concurrently, and sometimes they are working entirely separate as to time and as to function; but, in any event, they are all working toward the same objective, and I do not feel that the objections are sound as to orders from the Director of Selective Service. He has certain rights and privileges in connection with the appeal board, and whether he operates through the local board and thence to the appeal board, just how those records are obtained doesn't make so much difference so long as they are given consideration.

Now the presumption is that each one of these boards acted in accordance with law and the regulations. Because the chairman of the draft board writes a letter in which he says that he feels that from the information obtained from the War Board back in South Dakota that he has to vote for a certain classification a certain way or classify a certain way doesn't indicate that that was the attitude of the entire board. Each one of them is presumed to do his duty. And he may have stated the matter in a little broader form than he really intended, and I think that there is nothing there that makes invalid the act of the board. Nor by the pointing out of one item are we to conclude that all of the rest of the evidence was discarded. We must understand that this board did have a good deal of other evidence before it, and it doesn't seem to me that it is my function to say to the draft board or to the appeal board, "If I had surveyed the evidence I would have arrived at a different conclusion."

This case is properly here on an application for a writ of habeas corpus, the man having submitted himself to the jurisdiction of the army officers. It is immaterial what I think the law should be, it is immaterial what I would have decided on a given state of facts. The point here is the contention that both the appeal board and the local draft board acted in an arbitrary and capricious manner. I cannot find that they did.

There is a good deal of discussion of the letter from De Velder and claiming that erroneous deductions were made from that letter by the draft board. The appeal board had all of those matters before it and if it is possible that the local board arrived at an erroneous deduction, then the appeal board certainly would have corrected that erroneous deduction. They are trained men. I think the same thing is true with regard to that communication as is true with regard to the summary and the three letters which were, as I consider it, a part and parcel of the same matter.

It is the duty of that administrative body or those administrative bodies to determine, as was suggested, whether or not there is a dual occupation and whether or not under the law the man comes within the provisions of the law as I have read it to you.

Even though it is conceivable that a member of a local draft board might have predicated his decision upon an erroneous deduction, that erroneous deduction has not been shown to have been made, nor is it presumed to have been made by the appeal board.

The writ will be quashed, the proceedings dismissed, and the applicant remanded to the authority and control of the military authorities.

[Endorsed]: Filed Apr. 26, 1944.



In the District Court of the United States in and for  
the Southern District of California  
Central Division.

No. 3319-RJ

In the Matter of the Petition of

NELSON B. CRAMER

For Writ of Habeas Corpus

ORDER AND JUDGMENT DISCHARGING WRIT  
AND DISMISSING PETITION AND RE-  
MANDING PETITIONER TO CUSTODY.

The respondent having produced Nelson B. Cramer before this Court in obedience to the Writ of Habeas Corpus herein, and having made his Writ whereby it appears that said Nelson B. Cramer is a member of the Armed Forces of the United States; and said Nelson B. Cramer having appeared with his attorney, Philbrick McCoy, in behalf of said Writ, and Charles H. Carr, United States Attorney for the Southern District of California, and James M. Carter, Assistant United States Attorney for said District, appearing for respondent in opposition to said Writ; and the Court having heard the petition and inquired into the facts; and evidence having been offered and received, and the case having been argued by counsel; and the Court having on December 31, 1943, rendered its decision in the matter, and having ordered the Writ discharged the petition dismissed, and



the petitioner, Nelson B. Cramer, remanded; it is hereby finally

Ordered, Adjudged and Decreed that said Writ of Habeas Corpus be, and the same is hereby, discharged, and the petition dismissed on the merits, and the said petitioner, Nelson B. Cramer, be, and he is hereby, remanded to the custody of the United States Army.

Dated: March 29, 1944.

RALPH E. JENNEY

United States District Judge.

Presented by:

James M. Carter

JAMES M. CARTER

Assistant U. S. Attorney

Approved as to form:

Philbrick McCoy

PHILBRICK McCOY

3/24/42.

Judgment entered Mar. 29, 1944. Docketed Mar. 29, 1944 Book 24, page 342. Edmund L. Smith, clerk; by P. D. Hooser, deputy.

[Endorsed]: Filed Mar. 29, 1944.

[Title of District Court and Cause.]

NOTICE OF APPEAL.

To Col. Jesse G. France, Respondent and Appellee, and  
Charles H. Carr, United States Attorney, and James  
M. Carter, Assistant United States Attorney, his at-  
torneys:

You and each of you will please take notice that the  
Petitioner hereby appeals to the Circuit Court of Appeals  
for the Ninth Circuit from the judgment made and en-  
tered in the above-entitled proceedings on March 29, 1944,  
discharging the Writ of Habeas Corpus theretofore issued  
therein and dismissing said proceedings on the merits and  
from the whole thereof.

Dated: March 30, 1944.

Philbrick McCoy

Attorney for Petitioner and Appellant

[Endorsed]: Filed & Mailed Copy to Charles H. Carr,  
Atty for Respdt., Col. Jesse G. France Apr. 3, 1944.

[Title of District Court and Cause.]

### COSTS ON APPEAL.

Whereas, Nelson B. Cramer has heretofore applied for a Writ of Habeas Corpus, which said Writ was issued by the above entitled Court and upon the return thereof, said Nelson B. Cramer being present and represented by counsel and the said application having been heard and considered and the Court having thereafter on the 29th day of March, 1944, rendered its judgment quashing said writ and dismissing said proceedings on their merits, and

Whereas, said Nelson B. Cramer desires to take an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit and is required to furnish an undertaking in the amount and conditioned as hereinafter set forth.

Now, Therefore, in consideration of the premises and the taking of said appeal, the undersigned Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, has hereby acknowledged itself bound in the sum of Two hundred and fifty and no/100 (\$250.00) Dollars, to the effect that said Appellant, Nelson B. Cramer, shall answer all costs which may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 3rd day of April, 1944.  
FIDELITY AND DEPOSIT COMPANY OF MARY-  
LAND

By ROBERT HECHT

Robert Hecht

Attorney in Fact

Attest

(Seal)

THERESA FITZGIBBONS

Theresa Fitzgibbons

Agent

State of California,     )  
County of Los Angeles ) ss:

On this 3rd day of April, 1944, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit



Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

S. M. SMITH,

Notary Public in and for the County of Los Angeles,  
State of California.

My commission expires February 18, 1946.

Examined and recommended for approval as provided in Rule 8.

PHILBRICK McCOY

Attorney

I hereby approve the foregoing.

Dated this 3 day of April, 1944.

EDMUND L. SMITH,

Clerk, U. S. District Court, Southern District of California,

By John A. Childress,

John A. Childress,

Deputy.

The premium charged for this bond is \$10.00 Dollars per annum. 4693094.

[Endorsed]: Filed Apr. 3, 1944.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY ON APPEAL.

Pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, Appellant states that he intends to rely on the following points on his appeal in the above-entitled proceeding:

I.

The District Court erred in quashing the Writ of Habeas Corpus and dismissing the proceedings for the following reasons:

1. The order of induction is void and illegal in that it was made in violation of section 5, subdivision (k), Selective Service and Training Act (added Nov. 13, 1942, U. S. C. A., Tit. War, Appdx. sec. 305).

2. The reclassification of petitioner in Class I-A instead of in Class II-C and said order of induction are not founded on and not supported by any substantial and competent evidence.

3. The reclassification of petitioner in Class I-A instead of in Class II-C and the order of induction were made and issued by said Local Board as the result of an arbitrary, unfair, and capricious enforcement and administration of said Act, in that: (a) there is no substantial and competent evidence before the Board to support said reclassification and order; (b) said reclassification and order were made in disregard of all the evidence submitted

by petitioner to said Board in support of his application to be again classified in Class II-C; (c) petitioner was not accorded a full and fair hearing before said Board; (d) said reclassification in Class I-A was based in part upon matters appearing in the record which petitioner was not given an opportunity to rebut; and (e) said reclassification and order for induction were approved by Col. Kenneth H. Leitch, State Director of Selective Service, acting in an arbitrary, unfair, and capricious manner in the enforcement and administration of said Act.

4. In reclassifying petitioner in Class I-A instead of in Class II-C, and in issuing said order of induction, said Local Board abused its discretion and exceeded its authority in the particulars immediately hereinabove set forth in subparagraph 3 of this paragraph.

5. By said classification in Class I-A instead of in Class II-C, and by said order of induction, petitioner has been and is denied due process of law as guaranteed him by the 5th Amendment of the Constitution.

## II.

The District Court, in its oral decision, erred in holding that when a registrant under the Selective Service and Training Act of 1940, as amended, has perfected an appeal to the appeal board, the only thing before the Court for consideration on the habeas corpus proceeding is the action of the appeal board, that action having superseded the action of the local selective service board.

III.

The District Court, in its oral decision, erred in holding that the local selective service board fully complied with section 627.13 of the Selective Service Regulations, requiring such Board to prepare and place in the file of the registrant a written summary of all facts considered by the local board which do not appear in the written information in the file.

IV.

The District Court, in its oral decision, erred in holding that, in proceedings to reclassify a registrant already classified in Class II-C, the local selective service board or the appeal board may reconsider matters of evidence or other matters of record already considered in so classifying the registrant.

V.

The District Court, in its oral decision, erred in holding that, in reclassifying a registrant, the local selective service board, have to take into consideration the requirements for manpower in various categories.

PHILBRICK McCOY

Attorney for Petitioner and Appellant.

[Endorsed]: Filed Apr. 3, 1944.



[Title of District Court and Cause.]

STIPULATION AND ORDER TO SEND ORIGINAL  
PAPERS TO CIRCUIT COURT OF APPEALS  
IN LIEU OF COPIES.

It Is Stipulated between the parties to the above-entitled proceeding, by their respective counsel of record that, pursuant to the provisions of Rule 75, paragraph (i), of the Federal Rules of Civil Procedure, that the original papers comprising Petitioner's Exhibit 1, being the record of Local Selective Service Board, Board No. 271, Long Beach, California, shall be sent by the Clerk of this Court, by such means of transportation as he shall select, to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies of said original papers, to be safely kept by the Clerk of said Circuit Court of Appeals until the final determination of the appeal from the judgment in said proceeding, at which time said original papers shall be returned to the Clerk of this Court.

PHILBRICK McCOY,

Philbrick McCoy,

Attorney for Petitioner and Appellant,

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant United States Attorney,

By: JAMES M. CARTER,

Attorneys for Appellee.

It Is So Ordered.

April 26, 1944.

Ralph E. Jenney,

RALPH E. JENNEY,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1944.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL.

It Is Hereby Stipulated by Appellant and Appellee, by their respective attorneys of record, pursuant to Rule 75 (f) of the Federal Rules of Civil Procedure, that the following portions of the record, proceedings and evidence be included in the record on appeal:

1. Amended petition for Writ of Habeas Corpus filed December 16, 1943, including the order for the induction of Petitioner into the Army of the United States and the report dated 22 November, 1943, to members of Local Selective Service Board No. 271, Long Beach, California, signed by Hon. M. Q. Sharpe, Governor of South Dakota, with the documents attached thereto, but excluding the other exhibits attached to said petition.

2. Minute Order made by Hon. Paul J. McCormick on December 16, 1943.

3. Writ of Habeas Corpus, issued December 16, 1943.

4. Return to Writ of Habeas Corpus filed December 23, 1943.

5. Stipulation as to traverse to return filed December 29, 1943.

6. Transcript of oral decision by Court, December 31, 1943.

7. Minute Order of December 31, 1943.

8. Judgment of the Court entered March 29, 1944.

9. Petitioner's Exhibit 1, consisting of the file of Local Selective Board No. 271, Long Beach, California.

10. The notice of appeal.

11. This stipulation as to the record on appeal.

12. Appellant's statements of the points on which he intends to rely.

It Is Further Stipulated that the original papers comprising Petitioner's Exhibit 1 may be sent to the Circuit Court of Appeals in lieu of copies, upon the District Court's making such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

Dated: March 31, 1944.

Philbrick McCoy,

PHILBICK McCOY,

Attorney for Petitioner and Appellant,

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant United States Attorney,

By: JAMES M. CARTER,

Attorneys for Appellee.

[Endorsed]: Filed Apr. 13, 1944.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59 inclusive contain full, true and correct copies of: Amended Petition for Writ of Habeas Corpus including the order for the induction of petitioner into the Army of the United States and the report dated November 22, 1943 to members of Local Selective Service Board No. 271, Long Beach, California, signed by Hon. M. Q. Sharpe, Governor of South Dakota, with the documents attached thereto, but excluding the other exhibits attached to said petition; Minute Order entered December 16, 1943; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Stipulation as to Traverse to Return; Minute Order entered December 31, 1943; Order and Judgment Discharging Writ and Dismissing Petition and Remanding Petitioner to Custody; Notice of Appeal; Bond for Costs on Appeal; Statement of Points on Which Appellant Will Rely on Appeal; Stipulation and Order to Send Original Papers to Circuit Court of Appeals in Lieu of Copies and Stipulation as to Record on Appeal, which, together with Reporter's Transcript of Decision of Court and the Original of Petitioner's Exhibit 1, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.



I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.35 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5 day of May, 1944.

(Seal)

EDMUND L. SMITH,  
Clerk,

By THEODORE HOCKE,  
Deputy Clerk.

[Endorsed]: No. 10765. United States Circuit Court of Appeals for the Ninth Circuit. Nelson B. Cramer, Appellant, vs. Col. Jesse G. France, Commanding Officer, Reception Center, Fort MacArthur, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 8, 1944.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the Circuit Court of Appeals of the United States  
in and for the Ninth Circuit.

No. 10765

In the Matter of the Petition of

NELSON B. CRAMER

For Writ of Habeas Corpus

NELSON B. CRAMER,

Appellant,

vs.

JESSE G. FRANCE,

Respondent.

Pursuant to Rule 19, subd. 6, of the Rules of the above-entitled Court, appellant states that on this appeal he intends to rely on the points stated in his "Statement of Points on Which Appellant Will Rely" filed with the United States District Court for the Southern District of California, which Statement is incorporated herein by this reference.

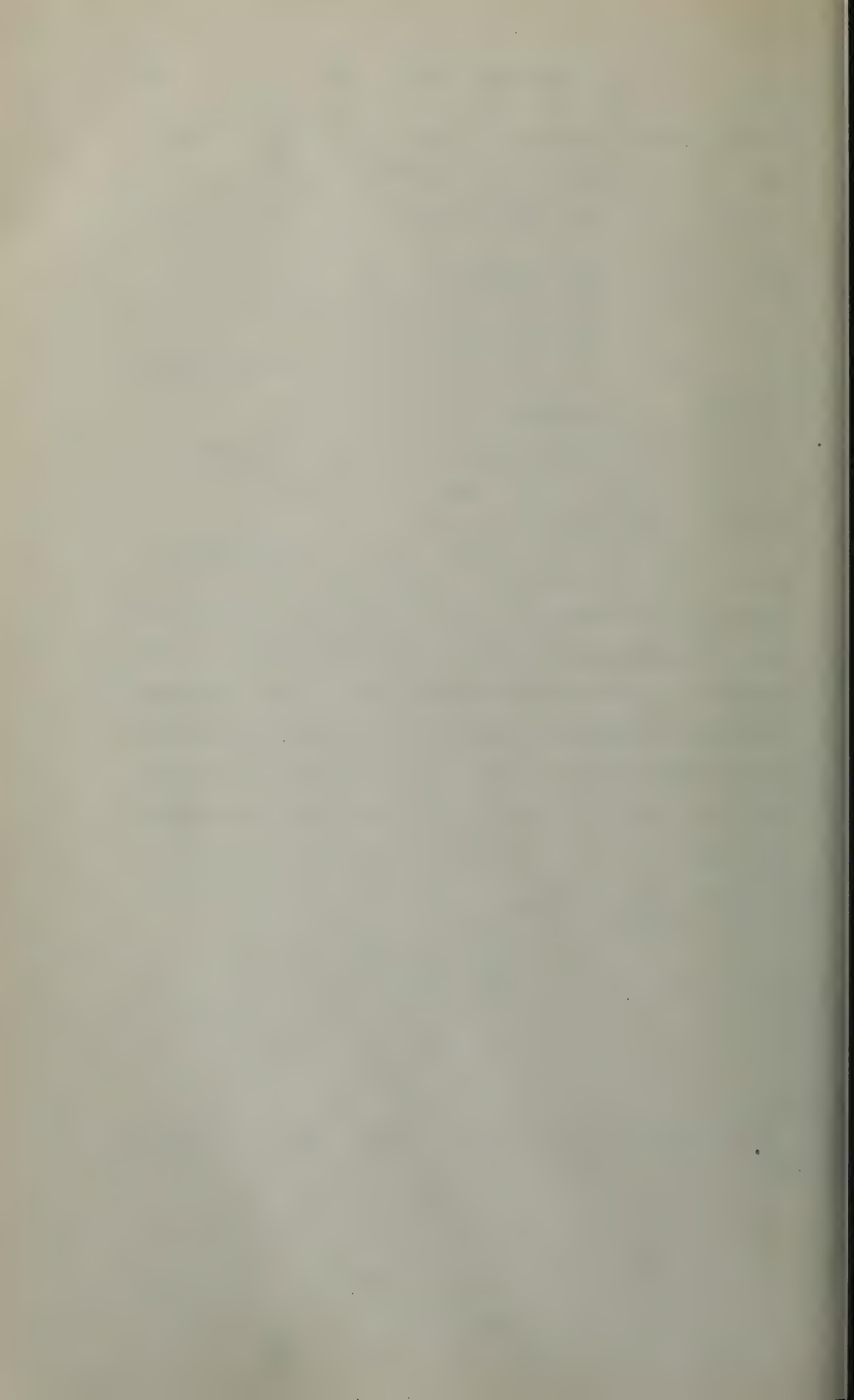
Dated: May 3, 1944.

Philbrick McCoy,

PHILBRICK McCOY,

Attorney for Appellant.

[Endorsed]: Filed May 8, 1944. Paul P. O'Brien,  
Clerk.



No. 10765

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

NELSON B. CRAMER,

*Appellant,*

*vs.*

COL. JESSE G. FRANCE, etc.,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

---

PHILBRICK McCoy,  
1015 Spring Arcade Building, Los Angeles 13,  
*Attorney for Appellant.*

**FILED**

JUL 24 1944

PAUL P. O'BRIEN,  
CLERK



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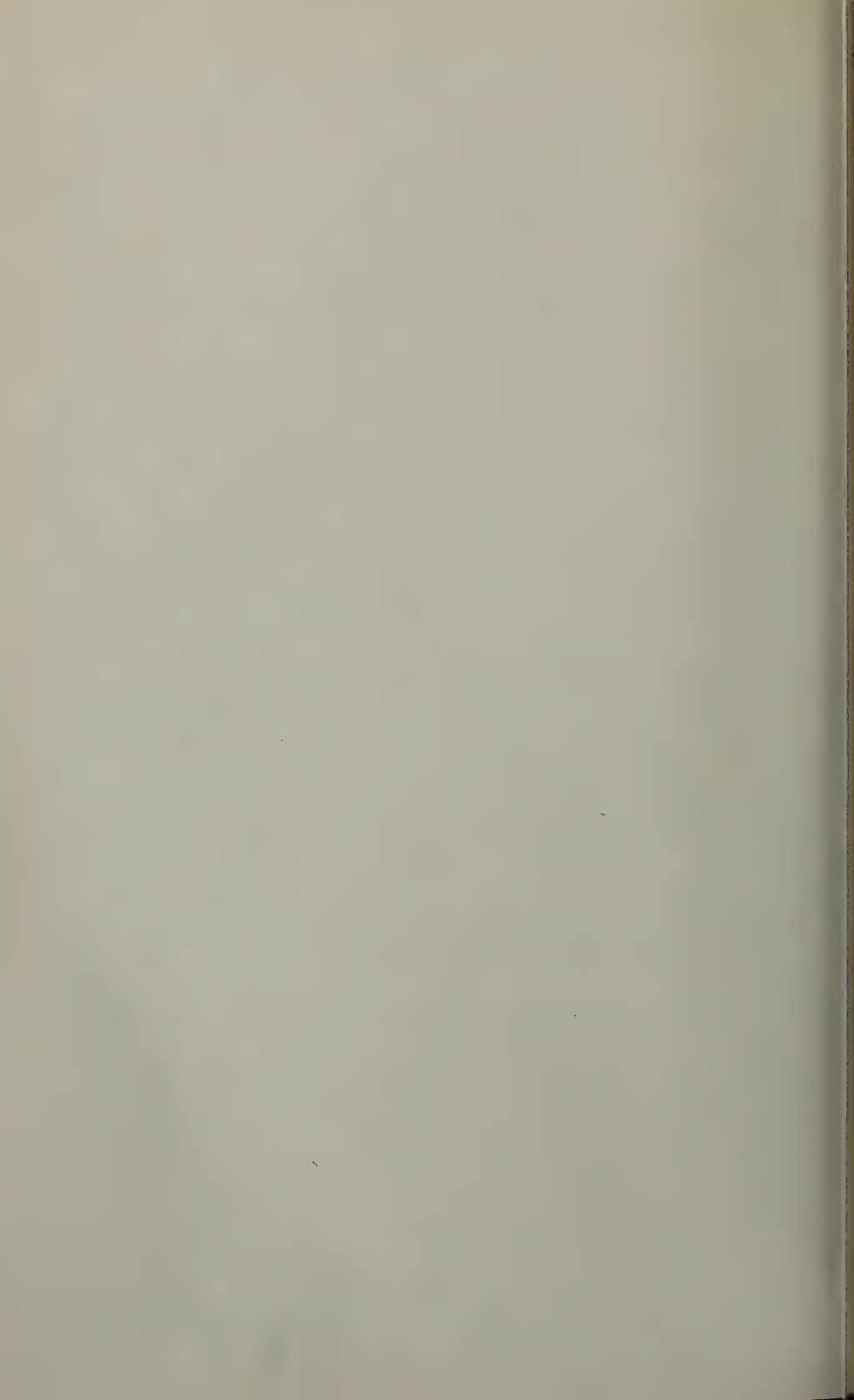
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No. 10765

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

NELSON B. CRAMER,

*Appellant,*

*vs.*

COL. JESSE G. FRANCE, etc.,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

**Jurisdiction.**

This is an appeal from the order and judgment of the United States District Court, Southern District of California, Central Division, Hon. Ralph E. Jenney, Judge, discharging the writ of habeas corpus sued out by appellant and remanding appellant to the custody of the United States Army. [R. 113.]

The District Court had jurisdiction pursuant to the provisions of sections 451 and 453, U. S. Code (R. S. secs. 751, 753), it being contended that appellant was held in custody in violation of a law of the United States, namely, the Selective Service and Training Act of 1940, as

amended. The facts upon which said jurisdiction is based are set forth in the Amended Petition for Writ of Habeas Corpus [R. 2-51], namely, that appellant, formerly classified under said Act in Class II-C, was unlawfully detained and restrained of his liberty by respondent, the commanding officer of the Reception Center at Fort MacArthur, California, having been inducted into the armed forces of the United States following his reclassification in Class I-A by Selective Service Local Board No. 271, of Long Beach, California, which reclassification was void, in that it was made in violation of Section 5, subdivision (k), Selective Service and Training Act of 1940 (added Nov. 13, 1942, 50 U. S. C. A. Tit. War, Appdx. sec. 305). When, as in this case, a registrant has obeyed the order for his induction, he may then seek a review in habeas corpus proceedings to test the validity of his classification.

*United States v. Grieme*, 128 F. (2d) 811 (C. C. A. 3);

*United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2).

This Court has jurisdiction to review, on appeal, the final order of the District Court by virtue of the provisions of section 463, subd. (a), U. S. Code (Act Feb. 13, 1925, ch. 229, sec. 6, 43 Stat. 940, as amended June 29, 1938, ch. 806, 52 Stat. 1232).

### Statement of Case and Questions Involved.

Appellant, a resident of South Dakota, temporarily residing in Long Beach, California, on registration day, registered on the day fixed by law for that purpose and became a registrant within the jurisdiction of Selective Service Local Board No. 271, a board composed of five members. In 1942, on the evidence then before it, the Local Board classified petitioner in Class II-C and deferred him from training and service as being a necessary man in an agricultural pursuit, namely, as a person engaged in farming his own property in South Dakota. [R. 4.]

On September 11, 1943, by a vote of three to two, after proper notice that it was about to reconsider his classification, the Local Board reclassified appellant in Class I-A, as immediately available for military service, notwithstanding additional evidence submitted by him in support of his request that he be continued in Class II-C and again deferred, and in the absence of any evidence showing a change in his occupation. On September 15, 1943, having learned for the first time of certain correspondence between the Local Board and one DeVelder, the Chairman of the United States Department of Agriculture War Board at Armour, South Dakota, prior to appellant's reclassification, appellant sought and obtained an opportunity to be heard by the Local Board. Appellant appeared before the Local Board on October 12, 1943, and on that day the Local Board again decided by a vote of

three to two that he was not entitled to deferment, and again (two members voting to the contrary) reclassified appellant in Class I-A. [R. 5-9.]

On October 18, 1943, appellant filed a notice of appeal from the Local Board to the Appeal Board, and the record was sent to the Appeal Board sometime after October 29, after the "inclusion of additional information" therein by direction of the Selective Service Coordinator. Appellant was not informed of the inclusion of this "additional information" until after the Appeal Board on November 5, 1943, approved the reclassification of appellant. [R. 9.] Appellant later discovered that the "additional information" comprised three so-called statements of personal privilege filed by three members of the Local Board. [R. 84-95.] On November 12, 1943, the State Director of Selective Service approved the action of the Local Board and directed that appellant be ordered to report for induction, notwithstanding appellant's request to submit for consideration a report of an investigation of certain material facts then being made. Said report [R. 19-49] was later submitted to the State Director of Selective Service in support of appellant's request for a further deferment [R. 10], but a further deferment was denied.

Appellant was inducted into the armed forces of the United States December 2, 1943. [R. 2-3, 16.] His amended petition for a writ of habeas corpus was filed December 16, 1943. [R. 49.] The writ was issued, returnable December 29, 1943 [R. 50-52], on which day,



appellee having filed his return [R. 53], and the parties having stipulated that the amended petition should constitute a traverse to the return [R. 55], the matter was heard. The entire record of the Local Board was received in evidence as Petitioner's Exhibit 1 [see R. 56-98 for part of this Exhibit], the matter was argued, and on December 30, 1943, the District Court handed down an oral decision [R. 100] and ordered the writ discharged, the proceedings dismissed and the appellant remanded to the authority and control of the military authorities. [R. 112.] The final order from which this appeal is taken was filed March 29, 1944. [R. 113-114.]

The questions involved are (1) whether the appellant's reclassification in Class I-A instead of Class II-C, and his consequent induction into the military service, violated the provisions of the Selective Service and Training Act of 1940, as amended November 13, 1942; (2) whether the reclassification of petitioner was supported by any substantial and competent evidence; (3) whether the officials of the Selective Service system acted in an arbitrary, unfair and capricious manner in reclassifying appellant and in causing his induction into the military service; (4) whether, in so reclassifying appellant, the Local Board exceeded its authority; and (5) whether appellant has been denied due process of law.

## Specification of Errors Relied Upon.

### I.

The District Court erred in quashing the Writ of Habeas Corpus and dismissing the proceedings for the following reasons [R. 119-121]:

1. The order of induction is void and illegal in that it was made in violation of section 5, subdivision (k), Selective Service and Training Act (added Nov. 13, 1942, U. S. C. A., Tit. War, Appdx. sec. 305).

2. The reclassification of appellant in Class I-A instead of in Class II-C and said order of induction are not founded on and not supported by any substantial and competent evidence.

3. The reclassification of appellant in Class I-A instead of in Class II-C and the order of induction were made and issued by said Local Board as the result of an arbitrary, unfair, and capricious enforcement and administration of said Act, in that: (a) there is no substantial and competent evidence before the Board to support said reclassification and order; (b) said reclassification and order were made in disregard of all the evidence submitted by appellant to said Board in support of his application to be again classified in Class II-C; (c) appellant was not accorded a full and fair hearing before said Board; (d) said reclassification in Class I-A was based in part upon matters appearing in the record which appellant was not given an opportunity to rebut; and (e) said reclassification and order for induction were approved by Col. Kenneth H. Leitch, State Director of Selective Service, acting in an arbitrary, unfair, and capricious manner in the enforcement and administration of said Act.

4. In reclassifying appellant in Class I-A instead of in Class II-C, and in issuing said order of induction, said Local Board abused its discretion and exceeded its authority in the particulars immediately hereinabove set forth in subparagraph 3 of this paragraph.

5. By said classification in Class I-A instead of in Class II-C, and by said order of induction, appellant has been and is denied due process of law as guaranteed him by the 5th Amendment of the Constitution.

## II.

The District Court, in its oral decision, erred in holding that when a registrant under the Selective Service and Training Act of 1940, as amended, has perfected an appeal to the appeal board, the only thing before the Court for consideration on the habeas corpus proceeding is the action of the appeal board, that action having superseded the action of the local selective service board.

## III.

The District Court, in its oral decision, erred in holding that the local selective service board fully complied with section 627.13 of the Selective Service Regulations, requiring such Board to prepare and place in the file of the registrant a written summary of all facts considered by the Local Board which do not appear in the written information in the file.

## IV.

The District Court, in its oral decision, erred in holding that, in proceedings to reclassify a registrant already classified in Class II-C, the local selective service board or the appeal board may reconsider matters of evidence or other matters of record already considered in so classifying the registrant.

## ARGUMENT.

### I.

#### The District Court Erred in Quashing the Writ, Dismissing the Proceedings and Remanding Appellant.

Appellant contends that the District Court erred in quashing the writ, dismissing the proceedings and remanding appellant to the custody of the military authorities for the reasons:

1. That the reclassification of appellant and the order for induction were void and illegal in that they were in violation of the statute;

2. That appellant's reclassification was not supported by any substantial and competent evidence;

3. That the Selective Service officials acted in an arbitrary, unfair and capricious manner, disregarded the evidence submitted by appellant, and considered statements which appellant was not given an opportunity to rebut;

4. That the Local Board abused its discretion and exceeded its authority; and

5. That appellant has been denied due process of law.



1. APPELLANT'S RECLASSIFICATION WAS IN VIOLATION OF THE STATUTE AND THE SELECTIVE SERVICE REGULATIONS.

Subdivision (k) of section 5 of the Selective Service and Training Act of 1940, added November 13, 1942 (Ch. 638, 56 Stats. 1018; 50 U. S. C. A. Tit. War, Appdx. sec. 305), hereinafter referred to for convenience as the Act, provides in part as follows [see R. 102]:

“(k) Every registrant found by a selective service local board, subject to appeal in accordance with section 10 (a) (2), to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained; . . .”

At the time of the action of the Local Board here under review the Selective Service Regulations [see R. 102] provided in part as follows:

“622.52. Class II-C: Man deferred by reason of his agricultural occupation or endeavor. (a) In Class II-C shall be placed any registrant who is found to be necessary to and regularly engaged in an agricultural endeavor essential to the war effort.

(b) A registrant placed in Class II-C shall be retained in that class so long as he is necessary to and regularly engaged in an agricultural occupation or an agricultural endeavor essential to the war effort and until a satisfactory replacement in such agricultural occupation or agricultural endeavor can be obtained . . .”

At the same time, section 622.24 of the Regulations defined a "necessary man":

"622.24. A registrant shall be considered a 'necessary man' in agricultural pursuit . . . only when all of these conditions exist: (1) He is, but for seasonal or temporary interruption would be, engaged in such activity; (2) he cannot be replaced because of a shortage of persons with his qualifications or skill in such activity; and (3) his removal would cause a serious loss of effectiveness in such activity."

While we agree with the court below, that, in order to secure deferment under this provision of the Act, a registrant must be found by the Local Board to be both necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort [R. 102], we submit that the Local Board disregarded all the affirmative evidence showing that this was the case, and that there was no substantial evidence before it to support its decision to the contrary, and that consequently its action was contrary to the statute. We shall discuss the evidence at length hereafter.

It is further submitted that the Local Board violated both the Act and the Regulations in not retaining appellant in Class II-C when his classification was reconsidered in 1943. Not only did the evidence show that he was still necessary to and regularly engaged in an agricultural occupation or endeavor, but there is no evidence in the record to show that "a satisfactory replacement" could be obtained, and the Local Board made no finding that such a replacement could be obtained.

The Selective Service Regulations have the force of law and must be followed by the Local Board.

*United States v. Miller* (D. C. 1918), 249 Fed. 985.

In this instance the language of section 622.25 of the Regulations is virtually the same as that found in section 5, subd. (k) of the Act. In *Ex parte Stanziale*, 138 F. (2d) 312 (C. C. A. 3d), the Court said of another section of the Regulations:

“The language used appears to be mandatory and we may assume, for the purpose of examining the point here, that if a Local Board violates the provisions of one of the regulations laid down for its guidance, the person affected by the violation may have court relief.”

So here, where the language of the Act and of the Regulations is mandatory, and the Local Board, in disregard of the evidence, violated both the Act and the Regulations, appellant was and is entitled to relief by the court.

2. THE DECISION OF THE LOCAL BOARD WAS NOT SUPPORTED BY ANY SUBSTANTIAL OR COMPETENT EVIDENCE.

It is conceded that the final decision as to appellant's right to exemption rests with the agencies created by the President under the Act, subject to review by the courts under certain well-defined rules.

*United States v. Grieme*, 128 F. (2d) 811;

*Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4).

The question here is whether there is *any* substantial evidence to sustain the action of the agencies involved,

*U. S. ex rel. Errichetti v. Baird*, 39 Fed. Supp. 388, having in mind that the court may not substitute its own judgment for that of the Local and Appeal Boards.

*In re Rogers*, 47 Fed. Supp. 265;

*U. S. ex rel. Cameron v. Embrey*, 46 Fed. Supp. 916.

In *Ex parte Stanziale*, 138 F. (2d) 312 (C. C. A. 3), the court said:

“It is also clear that a court’s criterion must be something different from the ‘substantial evidence’ rule so familiar in administrative review . . . The test of whether a draft board’s action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted.”

Although we believe that this is too broad a statement of the rule considered in the light of all the decided cases, nevertheless we submit that even that decision is not authority for the proposition that the Local Board’s decision can be made without any evidence to support it. It would seem that the correct rule is stated in the case of *Benesch v. Underwood*, 132 F. (2d) 430, quoted by the Government in its memorandum of points and authorities in the trial court:

“The action of the Local Board, within the scope of its authority, is final and not subject to judicial review when the investigation by the Board has been



fair and its findings are supported by substantial evidence; but if it is shown that the investigation has been unfair, or that the Board has abused its discretion by a finding contrary to all the substantial evidence, the courts are open for relief under the writ of habeas corpus, if the registrant has exhausted his administrative remedies under the Act."

Other decisions which support this view include:

*U. S. ex rel. Broker v. Baird*, 39 Fed. Supp. 392;

*U. S. ex rel. Pasciuto v. Baird*, 39 Fed. Supp. 411;

*U. S. ex rel. Ursitti v. Baird*, 39 Fed. Supp. 872;

*Goodwin v. Rowe*, 49 Fed. Supp. 703.

It is not questioned here that appellant exhausted his administrative remedies under the Act before seeking relief from the courts.

It is contended, however, that the findings of the Local Board are not supported by any substantial evidence, and that the Local Board abused its discretion by a finding contrary to all the substantial evidence.

The evidence offered to the Local Board by appellant is summarized in his written statement to the Board dated October 12, 1943. [R. 63-70.] The evidence consisted of appellant's affidavit in support of his claim for occupational deferment; thirty-one affidavits from appellant's neighbors and acquaintances; letters from the Governor and other residents of South Dakota, and certain letters from appellant to the Local Board dated September 11, 1943, September 17, 1943, September 18, 1943, and October 11, 1943. [See R. 13.] The originals of these documents are included in Petitioner's Exhibit 1, compris-

ing the entire record of the Local Board, and are now before the court. In part, at least, this evidence is corroborated by the report of the investigation made at the direction of the Governor of South Dakota under date of November 22, 1943, and submitted to the State Director of Selective Service while the matter was being considered by him. [R. 19-49.]

Other evidence in support of appellant's claim for deferment is to be found in three letters from one DeVelder, Chairman of the Douglas County, South Dakota, U. S. Department of Agriculture War Board, to Local Board No. 271, dated August 18, 1943, September 7, 1943, and October 4, 1943. [R. 56-62.] These letters were before the Local Board when it first reclassified appellant on September 11, 1943, although appellant was not aware of that fact at the time, and it was not until after his reclassification that day that appellant was given any opportunity to meet the adverse statements contained therein.

From the DeVelder letters it appears affirmatively that appellant owned a substantial amount of land in South Dakota, a large part of it being rented out to tenants on a share basis [R. 56]; that on a farm consisting of 569 acres, of which appellant took possession in March, 1942, operated by appellant and not by tenants, 343 acres were in crop land and the remainder in hay and pasture land; that on the crop land, appellant had planted 275 acres of corn and 68 acres of small grain during the farming season of 1943; and that he had hired three hands to work on his farm during the 1943 planting season [R. 57]; and that as of January 1, 1943, appellant maintained on his farm 68 head of cattle, 80 pigs, 150 hens and 3 brood sows. [R. 57.]

These letters were written by DeVelder in response to inquiries made on behalf of the Local Board by the Chairman [see R. 56, 58] pursuant to the authority found in Selective Service Regulations, section 621.7, by which [see R. 103]:

“(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.”

The agency here involved, the U. S. D. A. War Board for South Dakota, or Defense Board as it was first called, was established by “Memorandum No. 921” dated July 5, 1941, issued by the Secretary of Agriculture. It is not questioned that the U. S. D. A. War Board in South Dakota was an appropriate governmental agency within the meaning of section 621.7 of the Selective Service Regulations, and it is therefore considered unnecessary to examine here the authority by which they were created.

When the DeVelder letters were written, the Local Board was under instructions to give consideration to the number of “war-units” produced on a given farm which could be “directly attributed” to the efforts of the registrant. These instructions to the Local Board are found in Local Board Release No. 164 signed by the National Director of Selective Service, dated November 17, 1942, as amended by Local Board Releases Nos. 168 and 175, dated November 30, 1942, and January 16, 1943, all supplementing section 622.25 of the Regulations. The material portions of these Local Board Releases and of Local Board Releases 164-A (March 5, 1943), appear in the appendix to this brief. (Appendix A.) From these re-



leases it appears that "a national objective has been declared to be the production by as many farmers as possible of 16 or more war units" (L. B. R. 164, par. 9), and the Local Boards were required to give consideration to the standards so fixed, although admittedly the standard was not rigid. (L. B. R. 164, par. 10.) Measured by the tables furnished to the Local Boards by the Director in these Local Board Releases computed on the basis of the figures found in DeVelder's first letter of August 18, 1943, which we have quoted above [R. 56], appellant here is shown to have been responsible for the production of some 72.81 "war units," made up as follows: 68 head of cattle, 6.80 units; 80 pigs, 2.40 units; 150 hens, 1.95 units; 3 sows, 1.00 unit; 275 acres of corn, 55 units; 68 acres small grain, 4.76 units. This factor seems to have been entirely overlooked by the Local Board, except as it may have concluded that this production could not be "directly attributed" to the efforts of appellant.

There was no evidence before the Local Board from which it could find or conclude that the production on his farms could not be directly attributed to appellant, and that he was not necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort within the meaning of the Act and the Regulations. When appellant's case came up for consideration in July, 1943, he was already in Class II-C, and there was no evidence before the Local Board to show that he was no longer engaged in an essential agricultural occupation or endeavor or that a satisfactory replacement could be obtained as required by the Act and by the Regulations.

The remainder of the evidence can be discussed more appropriately when considering the arbitrary and capricious nature of the action of the Local Board.



3. THE LOCAL BOARD ACTED IN AN ARBITRARY, UNFAIR  
AND CAPRICIOUS MANNER.

It is contended that the trial court erred in holding that the Local Board, in reclassifying appellant, did not act in an unfair, arbitrary and capricious manner, in that it disregarded the evidence submitted by appellant, and considered statements of which appellant was not informed and which he did not have an opportunity to rebut.

We believe it will be conceded that appellant is entitled to the relief which he seeks if it can be shown that the Local Board as well as the Appeal Board and other Selective Service officials acted in an arbitrary, unfair or capricious manner in reclassifying him.

*United States v. Grieme*, 128 F. (2d) 811 (C. C. A.);

*United States ex rel. Mauro v. Downer*, 50 Fed. Supp. 412;

*In re Rogers*, 47 Fed. Supp. 265;

*Benesch v. Underwood*, 132 F. (2d) 430 (C. C. A.);

*Checinski v. United States*, 129 F. (2d) 461 (C. C. A.);

*Ex parte Stewart*, 47 Fed. Supp. 410 (D. C., Cal.).

In *Johnson v. United States*, 126 F. (2d) 242 (C. C. A. 8), the court said:

“The courts have no power to classify registrants—that is solely for the agencies created by or under the authority of Congress. But classification by such agencies must, under the powers given them by Congress, be honestly made, and a classification made in

the teeth of all the substantial evidence before such agency is not honest but arbitrary. Courts can prevent arbitrary action of such agencies from being effective.”

The phrase, “arbitrary and capricious,” is defined in *In re Rogers, supra*, where it was said by the court:

“The petitioner charges that the two Boards ‘acted arbitrarily and capriciously.’ The general meaning of that particular phrase is ‘without any reasonable cause, without cause based upon the law; without reason given; in disregard of evidence. It is comparable to, without justification or excuse; with no substantial evidence to support it; a conclusion contrary to substantial, competent evidence.’

“The court may not substitute its judgment for that of a duly constituted executive agency. If the finding of the agency is supported by testimony, then the finding will usually stand and may not be said to be ‘arbitrary and capricious.’ The rule is not changed by the fact that the nation is at war.”

While it is admitted that the courts cannot review the action of the Local Board or Appeal Board on the merits, or substitute its judgment for theirs, nevertheless, all the evidence must be considered from the standpoint of whether their decision was arbitrary and capricious and not founded on substantial evidence.

*United States ex rel. Cameron v. Embry*, 46 Fed. Supp. 916.

(a) *The DeVelder Correspondence.*

We submit that the action of the Local Board and of the Appeal Board was arbitrary and capricious within the meaning of the rules stated above. The only possible support which their action can have is to be found in certain portions of the DeVelder letters other than those portions to which we have already referred.

The DeVelder correspondence was initiated by the letter from the Chairman of the Local Board of August 12, 1943, which was acknowledged by DeVelder on August 18, 1943. [R. 56.] Before considering this correspondence in detail it should be noted that while it was quite proper, under the Regulations to seek the information from the War Board, and while the Local Board was not obligated to make this inquiry or to make a search for evidence beyond what was presented by the appellant (*cf. Rase v. United States*, 129 F. (2d) 204, 209), it would seem that it once undertook to do so, it should have completed its investigation before acting. We shall point out shortly wherein it failed to complete the investigation which it had started. Furthermore, it should be pointed out that it was decidedly irregular on the part of the Local Board to place this correspondence in appellant's file and to consider it in making its decision adverse to him on September 11, 1943, without advising appellant of the existence of the letters. (See *United States v. Kowal*, 45 Fed. Supp. 301.)

In DeVelder's first letter of August 18, 1943, he states [R. 57]: "That at no time during the past two years has Mr. Cramer personally done any farm work whatever himself. That at no time has Mr. Cramer displayed any knowledge of farming which would qualify him to supervise the hired men doing the work on such farm." These statements are patently nothing more than bald conclusions of the writer, not based on any facts within his personal knowledge nor even on observation, so far as the letter shows, and are not evidence, either substantial or otherwise, within the meaning of that term. It may be, as the trial court remarked in handing down his decision [R. 103, 107] that "the boards are not held to the strict rules of evidence which are sometimes required to be followed in courts of law," but it is nowhere suggested or held that they may base their decisions on the opinions or conclusions of others not supported by some sort of evidence of the underlying facts. All the cases which we have examined, including those cited above, hold that the decisions of the Local Board and Appeal Board *must be based on evidence*; no case holds otherwise.

Upon receipt of DeVelder's first letter, the Chairman of the Local Board wrote him of the receipt of several affidavits submitted by appellant, saying [R. 59]: "Each of these nine affidavits attest to the fact that Mr. Cramer has been working in the field, doing all kinds of farm work personally, and driving a tractor, and the affiants say under oath they witnessed Mr. Cramer in person so engaged. We are also in receipt of photostatic copies of a certificate of Farm War Service, and a letter dated June 1, 1943, mailed to Mr. Cramer." He then asks DeVelder: "What explanation can be offered for the reason nine



persons state they have seen Mr. Cramer doing the farm work himself, and yet we have a statement [from you] saying that Mr. Cramer has never undertaken to do any work whatsoever."

DeVelder's reply to this inquiry is dated September 7, 1943. [R. 60.] The pertinent portions of that reply are as follows:

"I am not authorized to enter into controversies as to facts nor do I feel justified in attempting to disprove anything which may be contained in affidavits procured by the registrant and filed with you. [R. 60.] As previously stated, I am not in a position to enter into any controversy as to whether the statements I have made are truthful facts or not but if you wish to find out for yourselves I would suggest that you write Mr. Cramer's neighbors, and I accordingly herewith submit a list of neighbors living within one and one-half miles of him. [R. 61.]"

We remarked above on the obvious duty of the Local Board to complete an investigation once undertaken, in fairness to the registrant. It is highly significant that the Local Board did not follow DeVelder's suggestion, in view of their expressed desire to have someone "throw some light on the situation." It is equally significant that DeVelder "hedged" as he did when confronted with a statement of the facts, after having said in his first letter [R. 57] that he would "be pleased to give you any further available information which you may require." Furthermore, it is significant to note from DeVelder's second letter his statements as to the business relations between appellant and the affiants named; certainly such relationships gave them ample opportunity to observe appellant's

activities as a farmer, and consequently add considerable weight to the straightforward statements made in their affidavits. On the other hand it does not appear that DeVelder's conclusions were based on such observations. The net result of this correspondence was to leave the Local Board on September 11, when it first reclassified appellant, with no evidence before it in support of DeVelder's conclusions or to refute the positive statements in the affidavits and letters submitted by appellant in support of his position. The originals of the several affidavits referred to by the Chairman of the Local Board in his letter to DeVelder are included in Petitioner's Exhibit 1 now before the court.

It is apparent from the Chairman's letter to DeVelder of September 3, 1943, that DeVelder's letter of August 18, 1943, did not contain any information or constitute "evidence" upon which the Local Board might fairly base the decision it made. Nevertheless, the Chairman seems to have reached a conclusion that day on the basis of that letter to which he apparently adhered throughout the proceeding. This is evidenced by his letter of the same day, September 3, 1943, to the secretary of the Local Board in which he said [R. 6]:

"I am returning to you the bulletin issued by the United States Department of Agriculture. Unless there is information in the affidavits to which you called attention over the phone a few minutes ago, it appears to me that the information given in Section 2 on the first page of the bulletin coupled with the letter from South Dakota Draft (*sic*) Board, makes it almost mandatory for our Board to classify Mr. Cramer I-A. Particularly is this true when we read the checkmarked paragraph 2 on page 3 which speci-

fies that war boards should be in a position to initiate requests for 2-C or 3-C classifications of registrants in agricultural occupations. Cramer's War Board apparently has no thought whatsoever of making any such suggestion in his behalf."

The bulletin to which the Chairman here referred, together with his letter are part of Petitioner's Exhibit 1, now before the court. The bulletin, designated WL310, LBR 48, was dated March 20, 1943, and issued by the California U. S. D. A. War Board, and appears in full in the appendix to this brief (Appendix B). The portions to which the Chairman referred in his letter to the secretary read as follows [see R. 7]:

Page 1, section 2:

"It is the responsibility of local draft boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification in II-C or III-C. Therefore steps should be taken to work out a mutually agreeable arrangement for the handling of this procedure. It is suggested that each county war board contact local Selective Service Boards and, if possible, arrange a joint meeting to discuss matters of procedure and policy at the county level or local board level in connection with Selective Service Local Board Release No. 164-A."

Page 3, paragraph 2:

"War Boards should also be in a position to initiate requests for the classification of agricultural registrants in II-C and III-C even though neither the registrant or his employer has requested deferment."



Before considering further the arbitrary and capricious manner in which the Local Board acted on the DeVelder correspondence in the light of the Regulations and directives referred to, it may be observed that when the matter was finally disposed of on October 12, 1943, while no additional inquiry had been made by the Board of DeVelder or of anyone else, nevertheless DeVelder and his associates on the South Dakota War Board on October 4, 1943, reported that "after carefully investigating and checking his records" it had found "that in our opinion Mr. Nelson Baker Cramer is not essential to the operation of his farm." [R. 62.] This statement, of course, was wholly gratuitous and not based on any facts so far as the record shows, and is of no value as evidence since it does not appear what investigation was made or what records were checked.

As already pointed out, section 621.7 of the Regulations provides [see R. 103]:

"(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

It is obvious that DeVelder's first letter of August 18, 1943 [R. 56], did not assist the Local Board, else it would not have been necessary for the Chairman, by his letter of September 3, 1943 [R. 58], to ask DeVelder to "clarify certain statements which seem to conflict," and to "throw some light on the situation." It is equally obvious, as we have said, from the Chairman's letter of the same day to the secretary of the Local Board that the Chairman had made up his mind that it was "almost mandatory for our



board to classify Mr. Cramer I-A," in view of the DeVelder letter and the bulletin from the U. S. D. A. War Board. [R. 6.] The fallacy in the Chairman's position thus taken, which resulted in his joining later in the arbitrary and capricious action of the board itself, lies in the fact that he did not consider paragraph 6 of the bulletin to which he referred, assuming that he had read it; had he done so he could not have honestly reached the conclusion that the bulletin made it "almost mandatory" to classify appellant in Class I-A. Paragraph 6 of that bulletin reads as follows:

"6. Since war boards have only the one job of obtaining needed agricultural production, *it should not be their responsibility to report their opinions as to whether or not an individual may be a draft dodger.* County war boards are to report the actual status of the individual engaged in agricultural work, outlining the actual production that this individual is responsible for. *The final decision with regard to whether or not an individual shall be inducted into the armed services rests with the local draft board or the appeal board, as the case may be.*" (Italics ours.)

In other words, neither the bulletin from the War Board nor the letter from the South Dakota War Board, nor any other like matter before the Local Board, made it mandatory or "almost mandatory" to reclassify appellant. That responsibility was affirmatively left with the Local Board which, as we have seen was required to act only on the basis of substantial and competent evidence.

To what extent the individual opinion of the Chairman as so expressed in his letter of September 3 to the secre-

tary carried weight with the other two members of the Local Board who reclassified appellant by their majority vote on September 11, we do not know. However, it is clear that the majority of the Local Board was still acting in an arbitrary and capricious manner and in disregard of the evidence on October 12, 1943, when they again reclassified appellant; this is apparent from the minutes of that meeting, the original of which is now before the court as part of Petitioner's Exhibit 1. The pertinent portion of those minutes is set forth in the petition. [R. 8.] Those minutes include the following entries:

“Mr. Cramer was advised that the board was required to follow instructions laid down in a directive from the U. S. Department of Agriculture County War Board, dated March 20, 1943, which in part reads: ‘It is the responsibility of Local boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification of II-C or III-C.’”

They also include the statement that the County War Board in South Dakota had:

“advised in writing they did not believe Mr. Cramer was entitled to deferment.”

It is evident from this that on October 12, 1943, the Local Board, or at least the majority of three who took the action above referred to, was acting on the basis of the supposed mandatory character of a part of the directive from the U. S. D. A. War Board as requiring them to classify appellant I-A. In so acting they disregarded the evidence submitted to them by appellant and based

their decision on no evidence at all, thereby disregarding the plain mandate of the Act, the Regulations and even the bulletin in question, which required the Local Board to make the final decision on substantial and competent evidence. Such action on the part of the Local Board was unfair, arbitrary and capricious, and should not be allowed to stand.

As said in *United States ex rel. Feld v. Bullard*, 290 Fed. 704 (C. C. A., cert. den. 262 U. S. 760), the facts which bring a registrant within an exempted class under the Act must, of course, be affirmatively proved. Here the facts were affirmatively proved by the affidavits and by appellant's own statement submitted to the Local Board. As the Chairman of the Board said in writing to DeVelder on September 3, 1943 [R. 59], nine of the affidavits then in hand attested to the fact that the affiants had personally seen appellant "doing all kinds of farm work personally," and there is no evidence in the record to the contrary.

It was said recently in *United States ex rel. Phillips v. Downer*, 135 F. (2d) 521:

"We made it clear in the Kauten case [*U. S. v. Kauten*, 133 F. (2d) 703] that the courts cannot act as appellate tribunals for the draft machinery, and that the weight of the evidence is a matter for the draft boards. Nevertheless, it has been considered settled under both the Draft Act of 1917 and the present Act that errors of law are to be rectified by the courts. The various authorities are collected and analyzed in *United States v. Grieme*, 3 Cir., 128 F. (2d) 811. We think, therefore, that the writ should be sustained."

So here, appellant does not ask the court to act as an appellate tribunal for the draft machinery, and agrees that the weight of the evidence is a matter for the Local Board to determine. But when, as here, the Local Board arbitrarily and capriciously makes a decision patently without any evidence to support it, there has been a substantial error of law which should be corrected by the courts.

(b) *The Statements of Personal Privilege.*

In so far as the action of the Appeal Board is subject to review here within the rules stated, for the correction of substantial errors of law, it is contended by appellant that the Appeal Board had before it erroneously, and erroneously and arbitrarily considered as a part of the file sent up by the Local Board three so-called statements of personal privilege placed in the file by the three members of the Local Board constituting the majority after their decision had been made, without advising appellant that this had been done, and without giving appellant an opportunity to meet any of the statements contained therein. We shall consider these statements hereafter in our discussion of the third specification of error. The matter is referred to here as constituting further evidence of the unfair, arbitrary and capricious action of the Local Board and of the Appeal Board.



4. *The Local Board Abused Its Discretion and Exceeded Its Authority.*

The manner in which the Local Board abused its discretion and exceeded its authority is fully discussed in the portion of our argument just concluded with respect to the absence of any evidence to sustain its action and with respect to its acceptance of the unsupported opinions and conclusions of DeVelder and the South Dakota War Board. The law and the regulations required the Local Board to make the final decision on the evidence before it. As we have pointed out, the Local Board blindly accepted the purported decision of another agency which, according to the minutes of the Local Board, but not according to the facts, had allegedly "advised in writing they did not believe Mr. Cramer was entitled to deferment." [R. 8.]

The discretion and authority to determine whether a registrant should be exempted or deferred is reposed by the Act and the Regulations only in President and the Boards created by him for the purpose of administering the Act, that is, the Local Board and the Appeal Board.

*United States v. Grieme*, 128 F. (2d) 811 (C. C. A. 3).

It is apparent that the Local Board abused its discretion in virtually delegating its authority to the War Board in South Dakota and, in so far as the record shows, in failing to complete the investigation it had started, and to exercise its discretion and reach its own conclusion on the facts before it. Such an abuse of discretion should be corrected by the courts.

5. *Appellant Has Been Denied Due Process of Law.*

The contention that appellant was denied due process of law is predicated on the fact that he was denied a fair hearing as required by the Fifth Amendment to the Constitution.

It is axiomatic that a registrant is entitled to have the Local Board and the Appeal Board consider all the facts, and to exercise its discretion and make its decision in accordance with the Act and the regulations; a failure in these particulars is a denial of due process.

*U. S. ex rel. Ursitti v. Baird*, 39 Fed. Supp. 872;

*U. S. ex rel. Broker v. Baird*, 39 Fed Supp. 392;

*Goodwin v. Rowe*, 49 Fed. Supp. 703;

*Rase v. United States*, 129 Fed. (2d) 204.

The particulars in which the hearing before the Local Board and the Appeal Board were not fair, and in which the Boards acted in an arbitrary and capricious manner have been fully discussed, and it would serve no useful purpose to review the facts here.

It is submitted that the constitutional rights of appellant have been infringed, and that the courts should interfere with the action taken by the Local Board and that the writ should now be sustained.

*United States v. Grieme*, 128 Fd. (2d) 811 (C. C. A. 3);

*Hauck v. Hoyle*, 51 Fed. Supp. 1005.

II.

**The Action of the Local Board Must Be Considered  
by the Court.**

It is the contention of appellant that the District Court erred in holding that when a registrant under the Act has perfected an appeal from a Local Board to the Appeal Board, the only thing before the court for consideration on habeas corpus proceedings is the action of the Appeal Board, that action having superseded the action of the Local Board. [R. 120.]

In his oral decision the trial court said [R. 105]:

“Now it has been my view, and I still adhere to that view, that when a registrant has perfected an appeal to the appeal board or caused the same to be perfected for him, that the only thing before me for consideration on the habeas corpus proceeding would ordinarily be the action of the appeal board, that having superseded the action of the local draft board. In this case, in order that the question may be decided without undue delay and in order that the record may be entirely before the Circuit Court of Appeals or the Supreme Court, in the event that those bodies are called upon to pass upon the question, I have permitted the record to go in and have given it very careful consideration on its merits, and the record is here so that he who wants may read, and the case may not be sent back for further trial, in all probability, on that point.”

In view of the court's action in admitting the record of the Local Board and his statement that he had “given it very careful consideration on its merits,” it might be

said that the contention of appellant involves only an academic or moot question. However, since the court was so emphatic in stating that it was his view, and that he adhered to the view, that when an appeal has been perfected the only thing before him for consideration "would ordinarily be the action of the appeal board," we must assume that the court's decision was based solely on his consideration of the action of the Appeal Board, regardless of the fact that he considered the record of the Local Board "on its merits." If our assumption is correct, it is necessary to consider the point briefly.

We believe that the only support for the position taken by the trial court is to be found in section 627.26 of the Regulations, quoted by the trial court in his oral decision [R. 104]:

"627.26 (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant."

It is significant that no decisions were referred to by the trial court in support of his view that the action of the appeal board supersedes the action of the Local Board. The error in the trial court's view of the matter becomes apparent when it is considered that a registrant cannot seek relief in any case until he has exhausted his administrative remedies, including an appeal to the appeal board,

*Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6);

*Johnson v. United States*, 126 F. (2d) 242, 247, yet in every case in which relief has been sought, the courts have stated that it is the action of the *local board*,



rather than the action of the appeal board, at least in the first instance, which has been the subject of consideration. Thus, in *Benesch v. Underwood*, 132 F. (2d) 430 (C. C. A. 6), it is said:

*"The action of the Local Board, within the scope of its authority, is final and not subject to judicial review when the investigation by the Board has been fair and its findings are supported by substantial evidence; but if it is shown that the investigation has been unfair, or that the Board has abused its discretion by a finding contrary to all the substantial evidence, the courts are open for relief under habeas corpus, if the registrant has exhausted his administrative remedies under the Act."* (Italics ours.)

It would serve no useful purpose to review here the many cases already cited, wherein similar language is to be found.

We have found no case which holds that the language of section 627.26 (a) of the Regulations is to be taken literally to mean that the classification of any registrant by an appeal board so far supersedes the action of the local board as to preclude, in habeas corpus proceedings, a consideration of the action of the local board. We find nothing in Part 627 of the Regulation or in any other part of the Regulations or the Act which sustains this proposition. Under these circumstances we submit that the decision of the trial court on this point is erroneous, and that in so far as his final order was based on this erroneous view of the law, this error was prejudicial to appellant.

### III.

#### **The Trial Court Erred in Its Holding as to the Filing of the Required Written Summary of Facts Not Appearing in the File.**

It is contended by appellant that the trial court erred in holding that the Local Board fully complied with section 627.13 of the Regulations requiring the Board to prepare and place in the registrant's file a written summary of facts not otherwise appearing therein. [R. 121.]

Section 627.13 of the Regulations, as quoted by the trial court in his oral decision, reads [R. 103]:

“627.13 . . . If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision..”

On this point the trial court said [R. 106, 107]:

“It is true that the law provides for a written summary to be sent by the local draft board to the appeal board of those facts which are not contained in the written record. In this case the registrant made the summary himself. Of course the law doesn't contemplate that the draft board shall do an unnecessary act, and three of the members of the draft board wrote what they called privileged communications, which denied, in part, some of the facts set forth in the summary. The contention of counsel for the registrant is that the registrant had a right to have

the file sent to the appeal board in the condition in which it was at the time that the summary was filed by the registrant, and he relies, to some extent, in that upon this case of *U. S. v. Cole*, in the District Court of Delaware. The findings of the Court there I believe to be *obiter dicta*. I am not sure that I agree with the decision even under the circumstances indicated in the opinion, but, even so, I do not feel that it is applicable here. It seems to me that the applicant should have known that when he made such serious charges as he did in what he described as his summary, that some, at least of the members of the board would not take it lying down, and that they would feel that they should at least file a formal denial. That is a part and parcel, as I consider it, of the summary which the law contemplated.

Now we must look through form to substance in all of these things. Naturally these lay boards—the local draft boards, and sometimes the lay members of the appeal boards—are not technical lawyers. They are not required to respond to precedents and the rules of evidence as do the formal courts. Seldom do administrative bodies consider themselves bound by those technical requirements which are recognized in formal courts of law. Taking it by and large I think that the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated.”

The facts to which this part of the court's decision relate are undisputed. On October 12, 1943, appellant appeared before the Local Board, and after reading a prepared statement [R. 63-70], submitted to examination by members of the board. On October 18, 1943, pursuant



to section 625.2 (b) of the Regulations, appellant filed with the Local Board his summary of what was said when he so appeared. [R. 70-84.] Before the record was sent to the Appeal Board three members of the Local Board prepared and placed in appellant's file their individual so-called statements of personal privilege. [R. 84-98.]

The error in the trial court's view of this matter is to be found in his statement, quoted above [R. 107]. "Taking it by and large I think that the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated." It is submitted that these documents could not be so considered, fairly or otherwise. Quite aside from their content, and quite aside from the question of whether the three members of the board mentioned in appellant's statement had the right, as the trial court suggested, to "at least file a formal denial," the individual statements of these three of the five members of Local Board, obviously prepared and filed at different times, could not be considered, even in conjunction with appellant's statement, as the summary which the law contemplated.

At the time here involved, section 627.13 of the Regulations required that *the Local Board* should prepare the summary; it did not contemplate that the summary should consist of one or more statements of personal privilege prepared and filed by individual members of the board, or any statement or "summary" filed by a registrant pursuant to another provision of the Regulations. The Regulations also required that the summary should "avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any



argument in support of its decision.” It is submitted that, individually and collectively, the three statements in question violate this injunction, in that they contain several expressions of opinions as well as arguments in support of the board’s decision. Furthermore, the three statements were admittedly made for the purpose of refuting appellant’s charges, and it is obvious that the writers did not intend them to be, nor can they be considered, as a summary of any facts considered by the Local Board which did not, at the time, appear in the written information in the file.

The Regulation contemplates that, in preparing the summary, all five members of the Local Board should act *collectively* in their official capacity; had they done so, their act would carry with it the presumption of validity which usually attaches to official acts of such agencies.

*Leuer v. McIntyre*, ..... Tex. Civ. App. ...., 162 S. W. (2d) 158 (1942).

The law does not contemplate that the acts of the individual members of the Local Board shall be binding in any way upon the registrant, and it is those individual acts which are here attacked. As the court said in the case just cited:

“Any act done by individual members of the Board in their private capacity towards fixing plaintiff’s status as a drafted man would of course be a nullity, without power to enforce, and nobody need pay any attention to them. But any act done by them collectively, in their official capacity, is a very different thing, and carries with it the usual presumption of validity incident to official acts of governmental agencies.”

As we have already pointed in another connection, the language of the Regulation is mandatory, and when it appears, as it does here that a Local Board violates the provisions of a regulation laid down for its guidance, the person affected thereby may have court relief.

*Ex parte Stanziale*, 138 F. (2d) 312 (C. C. A. 3).

In our discussion of the first assignment of error we stated we would discuss at a later point the contention that the reclassification of appellant was the result of the arbitrary, unfair and capricious enforcement of the Act, in that, in part, "(d) said reclassification in Class I-A was based in part upon matters appearing in the record which appellant was not given an opportunity to rebut" [R. 120]. These statements of personal privilege are the matters there referred to.

The record shows that appellant was finally reclassified by the local board October 12, 1943, and that appellant's notice of appeal was filed October 18, on which day he also filed his summary of the events of October 12 which provoked the statements in question [see R. 8-9, and original records of local board, Petitioner's Exhibit 1, now before this court]. The three statements of personal privilege are dated October 20 and 21 and November 1, 1943, respectively [R. 84, 88, 96].

It is submitted that appellant had the right to assume that no additional matters would be placed in the file before it was transmitted to the appeal board, except the summary contemplated by section 627.13 of the Regulations. In any event, he had no notice of the filing of the three statements, nor any opportunity to rebut them. It is submitted that their inclusion in the file and their con-

sideration by the appeal board was prejudicial to appellant's rights, and that the trial court erred in holding otherwise.

We have already pointed out that the trial court held that "the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated" [R. 107]. Almost immediately thereafter, in meeting appellant's contention that the inclusion of these letters in the record was prejudicial to his rights, the trial court held that they were not prejudicial, and that in any event the appeal board would quickly consider them as "chaff":

"The contention is made that certain letters sent up to them by the local board were prejudicial. I don't think they would be considered prejudicial in a court such as this, and I don't believe that the appeal board would be prejudiced by them. I think the appeal board would very quickly separate the wheat from the chaff and would take out of it what they properly might, without being too technical" [R. 108-109].

We fail to see how, at one moment, the appeal board must treat such documents as a part of summary which the local board is required to file and, which, perforce, must be given every consideration in its entirety, while, at the next, the appeal board is expected to separate those documents from the rest of the record as it would separate chaff from wheat, in order to avoid being prejudiced thereby. We respectfully submit that, in this particular case, the trial court reached inconsistent conclusions with respect to the documents in question, both of which are erroneous, and that the errors thus committed were prejudicial to the rights of appellant.



IV.

**The Trial Court Erred in Holding That the Local Board Might Consider Certain Matters Relating to Their previous Classification of Appellant.**

This assignment of error relates to the views of the trial court as to those matters once considered by a local board in classifying a registrant which may be reconsidered by the board in determining whether he should be reclassified, as stated by the trial court in his oral decision [R. 109-110].

Except as to the one matter, immediately hereinafter noted, included in this portion of the trial court's decision, it is now believed that the point is not well taken and this assignment of error is abandoned.

V.

**The Trial Court Erred in Holding That the Local Board Could Consider the Requirement for Manpower.**

It is contended that the trial court erred in holding that, in reclassifying a registrant the local board must take into consideration the requirements for manpower in various categories [R. 121].

With reference to manpower requirements, the trial court said in his oral decision [R. 110]:

“They [the local boards] have certain quotas that are necessary to be raised, and while the regulations provide that that shall not influence their judgment, they have to take into consideration, in determining who are necessary for what, the requirement for manpower in the various categories; and I presume that that is only natural.”



The law provides that "The selection of men for training and service under section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted", and that quotas of men to be inducted are to be determined as set forth in the Act and in accordance with the regulations. (Selective Service and Training Act, Sec. 4.)

When the local board considered this case on October 12, 1943, section 623.2 of the Regulations provided that "The registrant's classification shall be made *solely* on the basis" of questionnaires referred to in the section, "and such other written information as may be contained in the file." In thus expressly limiting the factors that are to be considered by the board, all other factors are expressly excluded. While the Regulations do not expressly provide, as the trial court puts it, that the quotas to be raised are not to influence the board's judgment in classifying a registrant, the Regulations and the Act contemplate that classification of registrants is to be completed before any men are selected to fill a call (see Part 632), and that neither quotas, manpower requirements, nor any factors other than those expressly referred to are to be considered in making such classifications, and that this is particularly so in the cases of those engaged in agricultural occupations or endeavors essential to the war effort. Thus, paragraph 8 of Local Board Release 164-A (see Appendix A), expressly and unequivocally states:

"Having made its determination that an individual registrant is necessary to and regularly engaged in

an agricultural occupation or endeavor essential to the war effort, the local board has no further discretion and must defer the registrant. No desire to meet calls for manpower should in any manner influence the local board's decision. Calls which cannot be met without taking registrants considered necessary to and regularly engaged in agricultural occupations or endeavors essential to the war effort should be left unfilled."

The trial court was accordingly in error in holding that the board had "to take into consideration, in determining who are necessary for what, the requirement for manpower in the various categories." This error was prejudicial to appellant.

### **Conclusion.**

The case is here on appeal from a judgment of the District Court quashing the writ of habeas corpus issued on appellant's petition, dismissing the proceedings and remanding the appellant to the military authorities. The purpose of the proceeding is to determine the validity of the induction of appellant into the armed forces of the United States pursuant to the Selective Service and Training Act of 1940, as amended. The question involved is this, whether appellant, having formerly been classified in Class II-C, as being a necessary man regularly engaged in an agricultural occupation or endeavor essential to the war effort, was properly reclassified in Class I-A, as being immediately available for military service.

It is conceded that the court may not substitute its judgment for that of the local and appeal boards. However, relief must be granted if it is shown, as we contend that it has been shown, that the reclassification and conse-

quent order for appellant's induction violated the Act; that the reclassification was not founded on nor supported by any substantial and competent evidence; that the reclassification was the result of the arbitrary, unfair and capricious enforcement and administration of the Act by the local and appeal boards; that those boards abused their discretion and exceeded their authority; and that appellant was and is thereby denied due process of law as guaranteed to him by the 5th Amendment to the Constitution.

The trial court found that these contentions were not sustained by appellant. Appellant contends that the judgment of the trial court was erroneous in all these particulars and should be reversed. It is contended further that in reaching his conclusions the trial court committed the other errors assigned and discussed herein by reason whereof the judgment of the trial court should be reversed.

Respectfully submitted,

PHILBRICK MCCOY,

*Attorney for Appellant.*









## APPENDIX A.

622.25

National Headquarters  
Selective Service System  
Washington, D. C.

November 17, 1942

As amended by:

LBR No. 168, 11-30-42

LBR No. 175, 1-16-43

Local Board Release No. 164

Effective January 16, 1943

Subject: Classification of Registrants in Agriculture

### Part I

1. Amendment to Selective Service Act.—Congress has amended section 5 of the Selective Service Act by the addition of a new subsection (k) which provides for the deferment of every registrant found by a local board (subject to the right to appeal to a board of appeal) to be necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort so long as he remains so engaged and until such time as a satisfactory replacement can be obtained. It further provides, that should any such registrant leave such occupation or endeavor, the local board shall reclassify such registrant in a class immediately available for military service unless he first requests of and obtains from his local board a determination that it is in the

best interest of the war effort for him to leave such occupation or endeavor for other work.

2. Class II-C and Class III-C.—The Selective Service Regulations have been amended to provide two new classifications as follows:

(a) In Class II-C shall be placed any registrant who has no grounds for deferment other than his occupation or endeavor and who is found to be necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort.

\* \* \* \* \*

3. Classification in Class II-C and III-C.—In accordance with revised regulations and as rapidly as possible, local boards are directed to classify or reclassify in Class II-C or Class III-C all registrants who are necessary to and regularly engaged in an agricultural endeavor essential to the war effort. A registrant who is classified in Class II-C or Class III-C will not be reclassified and he may move around freely so long as he continues to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. \* \* \*

\* \* \* \* \*

7. Continuation in Class II-C and III-C.—A registrant placed in Class II-C or Class III-C shall be retained in that class so long as he is necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort and until a satisfactory



replacement in such agricultural occupation or agricultural endeavor can be obtained. When in the opinion of the local board a satisfactory replacement can be obtained for a registrant classified in Class II-C or Class III-C, it shall reopen and consider his classification anew. The local employment office of the War Manpower Commission shall furnish information to the local board concerning the types of farm workers currently available for replacement.

\* \* \* \* \*

9. The war units plan—essential farm products.—Congress has recognized that the Nation is dependent upon agriculture for the successful prosecution of the war. The attainment of the largest production goals in history is of primary importance to the war effort. Every farm will need to make its maximum contribution to production of the farm products most needed in the war effort. The Department of Agriculture has devised and placed into effect and the War Manpower Commission has adopted the war-units plan as a way of measuring what each farm can contribute and as a basis for assisting each farmer in increasing his output. Essential products have been listed and appear in part I, appended. Those products less essential to the war effort are listed in part II. War units for the production of essential products are based chiefly on the amount of labor required. A national objective has been declared to be the production by as many farmers as possible of 16 or more war units.

10. Use of 16-war-unit objective as a guide in classification.—In determining whether a registrant engaged in the production of essential farm products qualifies for classification in Class II-C or III-C, local boards may give consideration to the 16-war-unit objective. It should be considered simply as an objective and to interpret it as a present-day standard upon which deferment is rigidly based would obviously be detrimental to essential production requirements for the Nation. At best, it simply represents a national objective which it is desired every able-bodied man engaged in agricultural production will equal or exceed. By reason of variations in production conditions and production methods as between regions, States, areas, and communities, the 16-war-unit objective may readily appear to a local board to be either too high or too low. When deemed advisable to properly reflect conditions existing within their own localities, local boards should deviate from the recommended objective. It would appear unreasonable, however, under most circumstances for a local board to consider a registrant for classification in Class II-C or III-C unless his own personal and direct efforts result in the production of at least 8 war units of essential farm products. In considering labor requirements for a particular farm, it should be borne in mind that war units are based upon the work performed by an able-bodied male adult. Each individual working on the farm other than an able-bodied male adult should be rated according to his work capacity, consideration being given to age, physical condition, or other work

impairments. For example: If a man is able to perform only half a man's work when actually employed at farm work, he should be rated one-half man equivalent. A local board would be entirely justified in classifying in Class II-C or III-C a registrant whose current production efforts do not equal the 16-war-unit objective but do exceed 8 war units of production, especially if there is an indication that diligent efforts are being made to increase production of essential farm products. In classifying a registrant, the basis should be his current and anticipated production in war units though in substantiating projected production estimates, past performances should be considered.

\* \* \* \* \*

12. Consultation with County War Boards.—It is recommended that local boards request the assistance of Department of Agriculture County War Boards in reaching determinations based upon the use of conversion tables.

\* \* \* \* \*

LEWIS B. HERSHEY,  
Director.

## War Unit.

A war unit is a measure of production of essential farm products. In the attached table essential farm products are given a relative value in terms of war units. The following, for example, are each equivalent to one war unit:

- 1 milk cow
- 20 feedlot cattle
- 1 acre in beets
- 5 acres in dry beans
- 20 acres in wheat
- 1 acre in carrots; etc.

## Conversion Factor.

The conversion factor is the percentage that a given product, whether it be a single animal or a single acre of special type production, bears to a war unit, for example:

- 1 acre of wheat is .05 of a war unit;
- 1 acre of onions is 1.00 of a war unit;
- 1 acre of strawberries is 1.50 of a war unit; etc.

The number of acres given to a certain type of production or the number of animals of a specified type multiplied by the conversion factor results in the war unit value, for example:

- 3 range cattle multiplied by the conversion factor of .07 results in .21 war unit;
- 19 acres of Irish Potatoes multiplied by the conversion factor of .50 is equivalent to 9.50 war units; etc.



## Group I.—Essential Farm Products and War Unit Conversion Factors

	Number of animals or acres equal to one war unit	Unit of pro- duction	Conver- tion factor
1. Livestock and Livestock Products:			

### *Beef Cattle:*

1. Farm herds .....	10	1 head	.10
2. Feedlot .....	20	1 head	.05
3. Range .....	15	1 head	.07
4. Stocker (bought and run on grass or grazed in fields)....	75	1 head	.01
*   *   *   *   *	*	*	*

### *Hogs:*

1. Sows to farrow, spring .....	3	1 litter	.33
2. Sows to farrow, fall .....	3	1 litter	.33
3. Feeder pigs (bought and sold during year) .....	30	1 head	.03

### *Poultry:*

1. Broilers and ducks..	600	100 birds	.17
2. Hens, laying pullets, and ducks for egg production .....	75	100 birds	1.30
3. Flock replacement....	300	100 birds	.33
4. Turkeys and geese..	40	100 birds	2.50
*   *   *   *   *	*	*	*

					Number of animals or acres equal to one war unit		Unit of pro- duction	Conver- tion factor
*	*	*	*	*	*	*	*	*
<i>Field Crops:</i>								
1.	Alfalfa hay (irrigated), broom corn, corn for grain and silage, dry edible beans, green peas for processing, rice, sweet corn for processing .....	5	1 acre	.20				
2.	Alfalfa hay seed, cover crop seed, nonirrigated alfalfa hay, grain sorghum, other tame hay and seed .....	10	1 acre	.10				
3.	Barley, dry field peas, oats and rye	15	1 acre	.07				
4.	Sweet corn for fresh consumption and hybrid seed corn..	3	1 acre	.33				
5.	Wild or native hay..	30	1 acre	.03				
6.	Wheat .....	20	1 acre	.05				
*	*	*	*	*	*	*	*	*

National Headquarters  
Selective Service System

Washington, D. C.

Local Board Memorandum No. 164-A

(Supplementing Local Board Memorandum No. 164)

Issued: 3/5/43

Subject: Classification of Registrants in Agriculture—  
Supplemental Information

\* \* \* \* \*

2. Responsibility of State and County War Boards, United States Department of Agriculture.—The Secretary of Agriculture has designated State and County United States Department of Agriculture War Boards( herein-after referred to as War Boards) as the agencies within the Department of Agriculture which other Government agencies may contact on the recruitment, placement, transfer, and utilization of agricultural workers. Agencies of the Selective Service System may therefore contact and consult with and be contacted and consulted by War Boards concerning these matters or concerning information pertaining to an individual registrant when considering his classification.

\* \* \* \* \*

4. Use of information in possession of War Boards.—Local boards may make full use of the information which is available in the files of the County War Boards. Whenever necessary, the local boards may secure information concerning the agricultural activities of registrants from

or through the County War Boards. The local board should avoid requesting this information from the registrant or his employer when the same information has been obtained or is obtainable from the War Board.

\* \* \* \* \*

8. Necessary agricultural workers not to be reclassified to fill calls.—The Congress has recognized the importance of food and fibre production and has by law provided for the deferment of each registrant who is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. The Congress has delegated to the local boards the administrative responsibility of deciding when and under what set of circumstances a registrant is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. Having made its decision that an individual registrant is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, the local board has no further discretion and must defer the registrant. No desire to meet calls for manpower should in any manner influence the local board's decision. Calls which cannot be met without taking registrants considered necessary to and regularly engaged in agricultural occupations or endeavors essential to the war effort should be left unfilled.

LEWIS B. HERSHEY,  
Director.



APPENDIX B.

WL 310

LBR 48

United States Department of Agriculture

California USDA War Board

P. O. Box 247

Berkeley, California

March 20, 1943

War Letter No. 310

Labor ..... No. 48

Re: County War Board Responsibility  
to Initiate Requests for Deferment  
of Agricultural Registrants

Memorandum No. 975-33 from the Secretary of Agriculture and Selective Service Local Board Release No. 164-A, both of which were sent you in War Letter No. 301, place a definite responsibility on local county war boards with regard to the classification of agricultural registrants. The acceptance of this responsibility will entail considerable work on the part of county war boards, but by doing a good job, they can render assistance to agriculture.

These memoranda have been discussed at length with officials from State Headquarters of Selective Service. The following statements have also been reviewed by the State Director of Selective Service and meet with his approval. Copies of this letter have been furnished to Selective Service to be sent to all local draft boards in

order that there may be complete understanding on their part of the part that county war boards have in this activity.

In order to facilitate action on the part of county war boards and to bring about reasonable uniformity of action throughout the State, the following suggestions and comments are made:

1. Immediate action should be taken to inform farmers that the county war board is in a position to render assistance to them with regard to Selective Service problems. All farmers should be advised that they should file Selective Service Form 42A on all employees who are of draft age in order that such employees and employers be given proper consideration in so far as the operations of Selective Service are concerned.

2. It is the responsibility of local Draft Boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification in II-C or III-C. Therefore, steps should be taken to work out a mutually agreeable arrangement for the handling of this procedure. It is suggested that each county war board contact local Selective Service Boards and, if possible, arrange a joint meeting to discuss matters of procedure and policy at the county level or local board level in connection with Selective Service Local Board Release No. 164-A.

Many county war boards have already established good working relationships with some or all of the draft boards in their counties. Where difficulties have been encountered in the past, another attempt should be made by the War

Board to arrive at a cooperative arrangement since War Boards now have definite responsibilities and cannot avoid frequent contact with the draft boards. In doing so it would be well to remember that the draft boards still have the job of classifying registrants even though War Boards now can be of real assistance. It would also be a good idea to become acquainted with the Selective Service co-ordinator who serves the draft boards in your county. He and the AAA fieldman have reviewed the instructions in detail and should be able to help in matters not clearly understood or where difficulties arise.

3. Since county war boards will now be making recommendations pointing to the classification of agricultural registrants in either II-C or III-C, plans should be made to follow up on such cases and report to the local draft board any changes in status of the registrants. Those no longer necessary to or regularly engaged in agricultural work are not entitled to be continued in these deferred classifications.

County war boards should be careful that agriculture does not abuse this privilege of II-C and III-C classification and one way to be certain is for War Boards to follow up on registrants who have been so classified at the request of War Boards.

4. In the event that an agricultural registrant is registered with a draft board that is not located in the same county in which the registrant is working, all Forms 42A and appeals and reports of investigation should be forwarded to the board in which the person is actually registered.

5. In cases where notice of induction has already been issued and local war boards believe that such a person

should be deferred, this information should be wired to the State War Board Office in order that proper action can be taken with the headquarters of Selective Service.

6. Since War Boards have only the one job of obtaining needed agricultural production, it should not be their responsibility to report their opinions as to whether or not an individual may be a draft dodger. County war boards are to report the actual status of the individual engaged in agricultural work, outlining the agricultural production that this individual is responsible for. The final decision with regard to whether or not an individual shall be inducted into the armed services rests with the local draft board or the appeal board, as the case may be.

7. Seasonal agricultural workers present an added problem in view of the fact that such persons move from one job to another. In these cases, Forms 42A should be filed by each employer with the registrant's draft board at the time that each person begins work for him. It is the obligation of the employer to notify the draft board at the termination of such employment. We cannot over-emphasize the point that farm employers should at all times have on file a Form 42A for each employee who is subject to induction into the Armed Forces.

8. Attention is called to the paragraph "2" of Secretary's Memorandum No. 975-33. War Boards are given 30 days during which time the registrant whose agricultural activity is not sufficiently important to agriculture has an opportunity to establish himself with full-farm employment. If he cannot do so in this time he should not be in II-C or III-C. This section places great responsibility on War Boards, but it also gives them an oppor-



tunity to consolidate agricultural operations so there will not be wasted manpower. At the same time it enables them to assure continued production through retaining necessary men on farms. Already many such cases have been referred to county war boards and plans should be made to handle them efficiently.

9. Adequate provision should be made to give proper service to farmers and their employees relative to Selective Service problems. Since there will be a large volume of such work and since it will be of value only if correctly done, the following suggestions should be in order:

- (1) County war boards should provide the necessary assistance at War Board offices, and perhaps elsewhere, to help farmers fill out Selective Service Form 42A.
- (2) War Boards should also be in a position to initiate requests for the classification of agricultural registrants in II-C and III-C even though neither the registrant or his employer has requested deferment.
- (3) Since Form 42A is a federal affidavit it will be necessary that such forms be signed in the presence of some person who is qualified to attest to such signature. A notary public, postmaster, member of a local draft board or a member of a selective service advisory board is so qualified. Please note that under law no charge can be made for notarizing this form.
- (4) In case of Forms 42A filed by the county war board the forms should be signed by the chairman of the War Board or by some other member of the War Board who has been designated for that pur-

pose. The draft boards in the county should be notified in writing with sample signatures of the persons who will sign Form 42A for the War Board.

- (5) All reports made to local draft boards must be in writing. Reports made over the telephone or verbally are not acceptable and have no standing at all if the case is appealed. In order that all the necessary information be provided to the draft board, War Boards should use the attached form in making reports. Since the USDA War Board Case Report Form does not have the same status as Selective Service Form 42A, this form should be attached to a Form 42A. The 42A should be completed only in so far as the first three lines of information are concerned on that form. Under the item of "Title of present job" the notation should be made "See Case Report Form attached." The 42A which is attached to the Case Report should be duly signed by the chairman of the War Board or by a designated member. This signature must be properly notarized as indicated in paragraph 9(3). Please advise the draft boards in your county that this form is being used in order to get complete and uniform reports. In the past many cases have not received due consideration because of incomplete information and the use of this form should eliminate such mistakes or omissions.
- (6) County war boards can and should file appeals where they believe registrants are not properly classified. In making appeals they should always be in writing and the word "appeal" must appear

in the document. A letter or statement can serve for this purpose. Also, the proper selective service form may be filled in and signed at the draft board office. Such appeals should be directed to the local draft board. All pertinent facts concerning the case should be set forth clearly and concisely.

(7) Before a Form 42A is filed by a county war board or a report is made upon request of a draft board or an appeal is filed, there should be an investigation of the case. These investigations must be made currently in order to show the correct facts at the time the report is made. Arrangements should be made so that investigations can be made promptly and in a reliable manner with as little expense and travel as possible. It is recommended that the services of AAA county and community committeemen and the field personnel of all agencies be used for this purpose.

(8) In making investigations the first step should be (as in all other cases where farmers are being assisted by county war boards) to refer to the Farm Registration Form for the farm. If one is not on file, the contacts that are made to investigate the need for this draft classification should be used to get a completed Farm Registration Form.

10. The success of this program will depend to a large degree upon the cooperation between county war boards and local Selective Service draft boards. In view of the close working relationship between War Boards and county draft boards, every effort must be made to work out necessary plans of operation which are acceptable to all concerned. We realize, due to the vast number of draft

boards involved and the various conditions which exist between different parts of the State, that no one over-all policy would be equally applicable. As problems develop which cannot be worked out locally between War Boards and local draft boards, such should be reported to the AAA district fieldman or to the State War Board Office. We feel that such problems can be properly taken up with the headquarters of the State Selective Service system and solved to the mutual benefit of all concerned.

11. Under separate cover this office will provide a small supply of Forms Calif. WB No. 26. These forms should be prepared in duplicate in order that a complete record of all cases can be maintained in the War Board office. Additional copies may be obtained from this office if needed.

DAVE DAVIDSON,  
Dave Davidson,  
Chairman California USDA War Board

Attachment:

Calif. WB Form No. 26



No. 10765

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

NELSON B. CRAMER,

*Appellant,*

*vs.*

COL. JESSE G. FRANCE, etc.,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

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*United States Attorney.*

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**FILED**

SEP 21 1944

**PAUL P. O'BRIEN.**

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No. 10765

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

NELSON B. CRAMER,

*Appellant,*

*vs.*

COL. JESSE G. FRANCE, etc.,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Statement of the Case.

Appellee objects to any reference in appellant's Statement of Case [R. 3-5] to the Amended Petition for Writ of Habeas Corpus as though the allegations of the same had been proved or stipulated to as facts in the matter. Whatever proof of those allegations was presented in the case came from Petitioner's Exhibit 1, only a portion of which is printed in the Transcript of Record [R. 56-98].

While the broad outline of the Statement of Case presented by appellant is substantially correct, appellee believes that certain implications therein are not entirely correct. For example, it is implied (Br. 4) that the State Director of Selective Service might have received the report from the Governor of South Dakota requested by appellant, but that he did not consider it. This is not correct because the State Director did defer induction for the



express purpose of receiving said report, and it was only after submission thereof to him that he finally approved the action, not of the local board, but of the appeal board.

Appellee does not desire to controvert the other implications in the Statement of Case because we believe it would serve no good purpose as the facts upon which appellant specifies error seem sufficiently clear; and, as a matter of fact, appellant does not use the various implications as a basis of argument.

### Questions Presented by the Appeal.

1. Is a review by the court of Selective Service classifications by habeas corpus after induction limited to a consideration of whether the inductee was deprived of his constitutional right to due process; *i. e.*, denied a fair hearing by a refusal to receive and consider evidence submitted by the inductee as a registrant; or should the court in its review determine whether or not the classification is based upon substantial evidence and whether or not the boards were arbitrary and capricious?

2. Should such a judicial inquiry be directed to the character of the hearing afforded and classification made by the local board or by the board of appeal?

3. If, in answer to question 1, this court states that the review is limited to a consideration of whether the inductee was denied a fair hearing, did appellant raise the question in the trial court when he alleged only that there was not substantial evidence and that the boards were arbitrary and capricious; and if so, was he denied a fair hearing?

4. If, in answer to question 1, this court states that in a review of the classification it is to determine whether or not the classification was based upon any or substantial evidence and whether or not the boards were arbitrary and

capricious, was the classification based upon any or substantial evidence and were the boards arbitrary and capricious?

5. Did the lower court commit any errors prejudicial to appellant in arriving at its decision?

## ARGUMENT.

### A. Appellee's Position.

A review by the courts of Selective Service classifications by habeas corpus after induction is limited to a consideration of whether the inductee was deprived of his constitutional right to due process; *i. e.*, denied a fair hearing by a refusal to receive and consider evidence submitted by the inductee as a registrant. And in so determining, the judicial inquiry must be directed to the character of the hearing afforded by the board of appeal since that board's classification supersedes that of the local board.

Under such a scope or rule of review, the action of the District Court must be affirmed without consideration by this court of the evidence before the local board, appeal board, or trial court, and without any consideration of the specifications of error relied upon by appellant because appellant does not, and cannot, contend that the Selective Service boards have refused to receive and consider evidence submitted by him. Further, in reviewing the action of the appeal board to determine whether it afforded the appellant a fair hearing, it must be presumed, in absence of evidence to the contrary, that the said board acted fairly and honestly. There is no evidence to the contrary in this case.

However, appellee submits that even if the rule of review suggested by appellant; *i. e.*, the substantial evidence

rule, the action of the District Court was not erroneous and should be affirmed. Not only is there substantial and competent evidence to support the classification of the local board, and no evidence of any capricious, arbitrary, or unfair action, but any charge made by appellant of error must be directed as well to the action of the board of appeal. With that controlling restriction in mind, the correctness of the District Court's decision is obvious and not even strongly contested.

Appellant contends that the District Court committed certain errors in arriving at its decision. Appellee's position thereon is that no errors were committed, but if any errors were committed, none of them were prejudicial to appellant.

**B. A Review by the Courts of Selective Service Classifications by Habeas Corpus After Induction Is Limited to a Consideration of Whether the Inductee Was Deprived of His Constitutional Right to Due Process; i. e., Denied a Fair Hearing by a Refusal to Receive and Consider Evidence Submitted by the Inductee as a Registrant.**

1. *The review by the courts of Selective Service classifications by habeas corpus after induction is limited to a consideration of whether the inductee was deprived of his constitutional right to due process.*

The question as to the scope of review by the courts of Selective Service classifications by habeas corpus after induction has been heretofore considered by this court and such review has been held to be limited to a consideration of whether the inductee was deprived of his constitutional

right to due process. Thus, in *Crutchfield v. United States*, 142 F. (2d) 170, 173, this court said:

. . . the power of review by the courts, if it exists at all, is limited to a consideration of whether the board deprived appellant of his constitutional right to due process, that is, a fair hearing after notice.

Again in *Bagley v. United States*, ..... F. (2d) ..... (decided June 14, 1944), this court indicated that the subject of inquiry is limited to questions of "due process."

It would appear that there could be no basis for contending for any broader scope of review than that announced by this court. Nevertheless, in the absence of a decision by the Supreme Court on this specific issue and in view of certain general ambiguous statements made by other courts, when unnecessary to decide the case before them, it is proper, we believe, to demonstrate the soundness of this court's statement as to the scope of review.

Since colonial days the duty of performing military service has been inherent in citizenship. Militia duty was imposed upon all arms-bearing citizens of the original thirteen states during the eighteenth century. When the Constitution was adopted, it was recognized that there should be no limitation on the power to raise armies. As stated by Alexander Hamilton in No. 23 of *The Federalist*:

. . . there can be no limitation of that authority . . . in any matter essential to the *formation*, direction, or support of the National forces. (Emphasis supplied.)

Military service has never been considered a denial of any fundamental right or freedom. Consequently, under the Constitution, Congress has the power to call the man-



power of the nation for military service in whatever manner it deems appropriate. The only rights which those affected have are the rights which are given by Congress. *Selective Draft Law Cases*, 245 U. S. 366; *Jacobsen v. Massachusetts*, 197 U. S. 11; *Hamilton v. Regents*, 293 U. S. 266; *Falbo v. United States*, 320 U. S. 549; *Local Board v. Connors* (C. C. A. 9), 124 F. (2d) 388, 390.

Since no constitutional or fundamental rights are infringed when a man is called for military service, there is no necessity for Congress to provide for the judicial review of the findings of drafts boards made in classifying registrants. Even though such review might nevertheless have been provided, Congress specifically rejected such a proposal.

Experience under the Draft Act approved March 3, 1863, demonstrated that judicial review of draft classifications was a dangerous impediment to the raising of an army in time of national peril. The situation was described as follows by the Provost Marshal General in his final report on the above Act to the Secretary of War:

During this draft the practice of serving writs of habeas corpus on the officers of the bureau became so prevalent as to interfere seriously with the progress of the business.

When it became necessary for Congress to adopt a draft act in 1917, the experience under the 1863 Act was carefully considered. At the hearing on the Selective Service Act of 1917, General Crowder, the Provost Marshal General, said:

In the legislation of 1863 the judgment of the board of enrollment provided for in that legislation was made conclusive upon the authorities, notwithstanding which, however, the courts undertook to inquire into

the decision of the enrolling boards in granting or refusing exemptions. This bill makes the judgment of such agencies as the President may constitute conclusive upon the questions of fact, so that the courts would not be able to inquire into the findings of fact. (Hearings before the Committee on Military Affairs of the House of Representatives on the Selective Service Act of 1917, 65th Cong., 1st Sess., p. 94.)

The legislative history of the 1917 Act shows that Congress rejected proposals for judicial review of draft board findings. The Act as originally introduced made no provision for boards of appeal. It was amended by the Committee on Military Affairs of the House of Representatives to provide as follows:

Upon the complaint of any person who feels himself aggrieved by his enrollment or draft as herein provided any court of record, state or federal, having general jurisdiction in matters pertaining to the writ of habeas corpus, according to state laws or by act of Congress, shall have jurisdiction, by proceedings in the nature of the writ of habeas corpus, to hear summarily and determine the rights of such person. (Cong. Rec. 65th Cong., 1st Sess., p. 1259.)

The following discussion took place on the floor of the House on April 23, 1917:

Mr. Crisp: From the hearings I understand that the bill made the findings of this board conclusive as to questions of fact, and that the court could not go beyond the findings of the board as to questions of fact.

Mr. Dent: It leaves the matter open to the courts. It repudiates that other proposition. (Cong. Rec. 65th Cong., 1st Sess., p. 964.)

The following statement was also made on the floor of the House during consideration of the bill:

Mr. Shallenberger: When the bill was brought before us no appeal was provided, and in the judgment of the committee we thought that was unwise, and so the amendment offered by Judge Harrison was placed in the bill providing that an appeal from the board to the local court with proper jurisdiction was to be allowed. (Cong. Rec. 65th Cong., 1st Sess., p. 1509.)

The House of Representatives passed the bill containing the above amendment and providing for the judicial review of draft board findings.

Similar bills had been introduced simultaneously in the House and the Senate. During the consideration of the Senate bill, which was reported out of committee with no provision for boards of appeal or for judicial review, Senator Hardwick said:

The House of Representatives . . . left him the right of habeas corpus in the courts. Under this bill the findings of whatever military commission may be appointed are absolutely binding and final on all questions of fact. (Cong. Rec. 65th Cong., 1st Sess., p. 1327.)

Senator La Follette presented an amendment providing for boards of appeal in lieu of review by the courts. Later,

Senator Kellogg presented a similar amendment which was agreed to. Thus, the Senate rejected the protection by way of habeas corpus contained in the House bill and adopted the system of boards of appeal. The House agreed to the Senate proposal and the provision for judicial review by habeas corpus of findings was eliminated, leaving the findings of the boards of appeal final.

The Selective Training and Service Act of 1940 incorporated the same provisions relative to the finality of classifications as those contained in the 1917 Act. There was no discussion at any stage relative to the question of judicial review. Consequently, it is evident that Congress intended the 1940 Act to have the same force and effect as the 1917 Act, as shown by the legislative history of the 1917 Act and as construed by the courts in the cases arising thereunder.

The strenuous efforts made in 1917 and 1918 to secure judicial review of draft classifications were unsuccessful. The courts stated that only when an inductee had been denied the due process provided for in the Act would the courts intervene. The rule was stated in the following words:

“It is only when the action of such a board was without jurisdiction, or if, having jurisdiction, it failed to give the party complaining a fair opportunity to be heard and present his evidence, that the action of such a tribunal is subject to review by the courts.”

*Franke v. Murray* (C. C. A. 8), 248 Fed. 865.



“We have only to inquire whether the relator’s appeal was fairly heard and determined.”

*United States v. Kinkead* (C. C. A. 3), 250 Fed. 692.

“It appears from the allegations of the complaint that the complainant filed an affidavit claiming exemption by reason of the fact that he was an alien, and that the local board denied his application, and that he appealed to the district board, which affirmed the local board. It thus appears that the complainant was heard, and it is nowhere alleged that he was denied a full hearing or that the board rejected or refused to consider any evidence he was entitled to present. In the absence of such a showing, we have no doubt that the decision of the board is final and cannot be interfered with by the courts. . . .

“We think a decision of the boards is final only where the board has proceeded in due form, and where the party involved is given a fair opportunity to be heard and to present his evidence.”

*Angelus v. Sullivan* (C. C. A. 2), 246 Fed. 54.

Any broader expressions as to the extent of judicial review appearing in certain opinions of the lower courts in cases under the 1917 Act may not, we believe, be said to have been controlling when Congress passed the 1940 Act. As a matter of fact, a review of all the reported habeas corpus cases under the 1917 Act discloses only four

instances in which inductees were released by the courts because of their classification.<sup>1</sup>

We find, then, that there is no constitutional or statutory provision for judicial review of the findings of the boards created under the Selective Training and Service Act of 1940. Such review is therefore limited, as this court has said, to the question of whether the inductee has been denied due process.

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<sup>1</sup>It will be noted that each of these four cases involved a non-declarant alien and the 1917 Act contained the following provision:

Such draft as herein provided shall be based upon the liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens.

Since non-declarant aliens had no fundamental obligations to serve under the 1917 Act, they occupied a different status from citizens or declarant aliens who were exempted or deferred. These four cases are the following:

*Ex parte Hutfis* (D. C. N. Y.), 245 Fed. 798. In this case the court found that the non-declarant alien had been given the wrong forms to fill out and he was unable to know of the mistake.

*Ex parte Cohen* (D. C. Va.), 245 Fed. 711. Here the registrant filed with the board conclusive documentary proof that he was a non-declarant alien. There was nothing before the board to contradict or cast any doubt or suspicion on this proof. It should be noted that the question of alienage was susceptible to definite proof and involved no exercise of judgment on the part of the boards, differing from questions of whether a farmer can be replaced.

*Arbitman v. Woodside* (C. C. A. 4), 258 Fed. 441. This case is similar to the *Cohen* case.

*Ex parte Beck* (D. C. Mont.), 245 Fed. 967. In this case the court held that non-declarant aliens were *excluded*, even though they had not claimed exemption. This holding was reversed in *Napora v. Rowe* (C. C. A. 9), 256 Fed. 832. However, it demonstrates the special problem presented by the non-declarant alien cases under the 1917 Act.

Cases in which registrants under the 1917 Act had been automatically inducted and sought relief from court martial for desertion must be distinguished from the cases involving questions as to classification. It was such a desertion case in which the court said:

The induction of a civilian into military service is a grave step, fraught with grave consequences. *Van Mehren v. Sirmeyer* (C. C. A. 8), 36 F. (2d) 876, 881-2.

Under the 1917 Act delinquents were made deserters, without the necessity of any actual notice to them, and thereby became subject to the severe penalty for desertion in time of war. This making of a deserter out of an unwitting registrant was the "grave" consequence the courts were considering. Military service itself was not so considered or described.

2. *The provisions of the Selective Training and Service Act of 1940 and the Regulations issued thereunder afford adequate protection for the rights of the individual registrant and afford him due process of law.*

Even though the need for men for the armed forces has been most urgent, and delay in the selection process could be most dangerous, Congress and the President have created a plan of selection and induction designed to grant every reasonable protection to registrants. The first step in the process is the filing of a questionnaire by the registrant, plus any other information he deems pertinent. Ten days are allowed for the filing of the questionnaire and advisory boards, usually composed of lawyers, provide free assistance to all registrants. (Part 621 of the Selective Service Regulations, Second Edition.)

The classification of a registrant is made in the first instance by his local board, composed of uncompensated civilians from the locality in which he is registered. The local board is required to place in the registrant's file a summary of any information, not already in the file, relied on in making the classification. When the local board has classified a registrant, it shall mail a notice thereof to the registrant, advising him not only of his classification but of his rights to a personal appearance and appeal. (Part 623.)

Following his classification, the registrant is given the right to appear in person before his local board. At such time the registrant may present such further information as he believes will assist the local board in determining his proper classification. After his appearance, the local board is required to consider again the registrant's classification and notify him of the result. (Part 625.)

The registrant has the right to appeal to the board of appeal within 10 days after he is finally classified by the local board. He is provided the free assistance of the government appeal agent, an attorney, in perfecting his appeal. The person appearing may attach to his notice of appeal a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the file. The registrant may not be inducted during the time afforded him for taking an appeal or while his appeal is pending.

When an appeal is taken, the local board forwards the registrant's entire file to the board of appeal. The board of appeal is composed of representatives of agriculture, labor, industry, etc., and is therefore familiar with the needs of the country in general as well as the needs of the armed forces. The board of appeal first checks the registrant's file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If not, the file is returned to the local board for further appropriate action. The board of appeal shall not consider any information not contained in the record received from the local board except general information concerning economic, industrial and social conditions.

The board of appeal classifies the registrant *de novo*, giving consideration to each class in the proper order. The registrant is notified by the local board of the action of the board of appeal. (Part 627.)



The registrant has 10 days in which to appeal to the President after receiving notice of the action of the board of appeal. However, he has a right to such appeal only in the event one or more members of the board of appeal dissented from such classification. In addition to the registrant's right of appeal to the President in the absence of a unanimous vote by the board of appeal, the State Director or the National Director of Selective Service may appeal any classification to the President at any time when they deem it to be in the national interest or necessary to avoid an injustice. The registrant is free to request such an appeal by the Director. (Part 628.)

Even after a registrant is inducted he may be discharged by the armed forces upon a claim that he was erroneously inducted. Such applications are submitted in writing by the inductee to his commanding officer. They are then forwarded to the State Director of Selective Service for a recommendation. (Local Board Memorandum No. 80, as amended April 28, 1943.)

The Circuit Court of Appeals for the Third Circuit has recently had occasion to point out that this procedure constitutes due process. In *United States v. Pitt*, decided July 27, 1944, that court said:

The means embodied in the Act for the raising of armed forces for the national defense bear a real and substantial relationship to the danger which had materialized with great rapidity upon the horizon of our national life. . . .

We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency. We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that

they afford him due process of law, and that the Act is constitutional in all respects.

The question here considered was discussed in "*Due Process*" and the *Selective Service System* by James Thomas Connor appearing in the *Virginia Law Review*, Vol. XXX, No. 3, June, 1944. It was there said:

When it is remembered that the Selective Service System is designed to meet a desperate emergency and to it has been given the mission of augmenting a pitifully small standing Army, it must be acknowledged that the requirements of "due process" so far as it demands fair notice and adequate hearings have been met to a reasonable degree.

What was stated by the Circuit Court of Appeals for the Third Circuit on July 27, 1944, in *United States v. Pitt* had been, in effect, recognized as early as December 13, 1941, by this court in its opinion in *Local Board v. Connors*, 124 F. (2d) 388. In fact, this court in *Local Board v. Connors* had occasion to consider and decide the first case on appeal under the 1940 Act involving the general question of the judicial review of Selective Service classifications.

3. *Since the procedure provided by the Selective Service System affords due process of law, it is only when the Selective Service boards have refused to receive and consider evidence submitted by a registrant; i. e., denied him a fair hearing, that a question of denial of due process is present.*

As pointed out above, this is the rule expressed by this court in *Crutchfield v. United States*, 142 F. (2d) 170. It was also contained in *Stanziale v. Paullin* (C. C. A. 3),

138 F. (2d) 312, reversing 49 F. Supp. 961, certiorari denied 320 U. S. 797, where the court said:

The task of classification of the nation's manpower for service in its defense differs greatly from the ordinary administrative action affecting an individual or a group. It is country-wide in scope, it includes a large portion of the population and obviously its operation must be both smooth and swift if the public object is to be accomplished. The enemy will not wait for the process of litigation to determine who must and who may not fight.

The procedure under the Selective Service Act necessarily, then, differs from the usual administrative routine. There are no hearings of right where witnesses may be called and examined and cross-examined. There is no representation by counsel either on behalf of the registrant or the Local Board. Nor are findings of fact and conclusions of law made. There is no statutory provision for judicial review. The "administrative tribunal," if the Local Draft Board may so be called, is not composed of experts, real or purported, but of citizens of the neighborhood in which their Board functions. In some cases it knows the registrants personally; in all cases it knows its own community. The analogy of the ancient jury of the vicinage suggests itself, composed of men of the neighborhood, who knew what was going on. Questionnaires answered by the registrant and supporting written statements present his status, from his point of view, to the Board. But these are not the sole determinants of his classification. Quotas that must be filled and the number of registrants available for military service within a given community are major factors for the Board's consideration. All the Local Board does after a consideration

of these facts is to place the registrant within one of the given classifications. The registrant, and he alone, may then appear personally, of right, before the Board to argue the correctness of his classification. Appeals to Selective Service Appeal Boards, and in some cases, ultimately to the President, may be had, but only the written file of the registrant goes up on appeal.

It is clear under the procedure prescribed by Congress that the classification of registrants is for the Draft Boards, not the courts. Should a case be one where the court is to interpose, the order should be a remand to the Draft Board to classify the registrant properly, not to make the classification itself. It is also clear that a court's criterion must be something different from the "substantial evidence" rule so familiar in administrative review. There is no transcript of whatever conversations the registrant may have had with his Board. There is no record showing the manpower situation in the district at the time of classification, how many men a particular Board was called upon to furnish at a given time and how big a list of available registrants it had. The test of whether a Draft Board's action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted. And lack of such consideration is not here, as it is not elsewhere, proved by proving that the decision was wrong.

This rule was expressed as follows in *Judicial Review of Selective Service Board Classifications by Habeas Corpus*, 10 Geo. Wash. L. Rev. 827, 837:

It is suggested, therefore, that the denial of a fair hearing must be established by independent evidence,



and that such evidence must relate to the proceedings of the appeal board and not the local board. This contemplates something more than examining the evidence upon which the appeal board classified the registrant. If the registrant is able to prove that the appeal board refused to consider the record, bearing in mind, however, that it need not accept sworn and uncontradicted statements as true; or that his file never reached the appeal board; or that the board members were bribed or prejudiced, or that certain evidence was lost or destroyed, then the court may properly conclude that the registrant has not been given a fair hearing and that its findings were made arbitrarily. If it appears, however, that all the proper evidence offered to the appeal board was accepted and considered there is no basis for court action. A court may be of the opinion that a given board was wrong but it is precluded by law from offering a remedy.

In connection with the above three authorities, it will be noted that the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Trainin v. Cain*, decided August 15, 1944, said:

. . . On this latter point many cases, without sharp consideration of the issues, merely state the now usual rule of review applied to many administrative agencies, namely, that review of the facts is limited to ascertaining whether there is "substantial evidence" to support the findings of the agencies. *Rase v. United States*, 6 Cir., 129 F. 2d 204, 207; *Graf v. Mallon*, 8 Cir., 138 F. 2d 230, 234-235; *Johnson v. United States*, 8 Cir., 126 F. 2d 242; *Benesch v. Underwood*, 6 Cir., 132 F. 2d 430, 431; *Seele v. United States*, 8 Cir., 133 F. 2d 1015, 1021; *United States v. Messersmith*, 7 Cir., 138 F. 2d 599; *Arbit-*

*man v. Woodside*, 4 Cir., 258 F. 441. There seems, however, considerable tendency to state a more limited rule than this, such as that examination is only to determine whether there is any evidence at all to support the findings of the local boards, *Checinski v. United States*, 6 Cir., 129 F. 2d 461, 462; *United States v. Buttecali*, D. C. S. D. Tex., 46 F. Supp. 39, 44, affirmed *Buttecali v. United States*, 5 Cir., 130 F. 2d 172; *United States v. Pace*, D. C. S. D. Tex., 46 F. Supp. 316, or even more strictly whether the boards have considered all the evidence presented to them, without regard to what their conclusions may be. *Ex parte Stanziale*, 3 Cir., 138 F. 2d 312, 313-315, certiorari denied *Stanziale v. Paullin*, 320 U. S. 797; *Crutchfield v. United States*, 9 Cir., 142 F. 2d 170, 173-4; Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus*, 10 Geo. Wash. L. Rev. 827, 837-838; . . . In this circuit, however, we seem practically committed to the test of whether the local board had any evidence before it to sustain its result.

It will be seen that the Circuit Court of Appeals for the Second Circuit in the *Trainin* case adopted the test of whether the Selective Service boards had any evidence before them to sustain the classification, rejecting the "fair hearing" rule announced by this court in the *Crutchfield* case and the Third Circuit in the *Stanziale* case. We believe that it is important to understand that the "fair hearing" rule is the proper rule rather than the "no evidence" rule.

The difficulty resulting from the application of the "no evidence" rule was discussed in *United States ex rel. Levy v. Cain* (D. C. E. D. N. Y.), decided June 20, 1944. In that case District Judge Byers said:

Upon the foregoing statement of facts, the Court is requested to sustain the writ upon the theory which has been stated; in other words, to overrule the action of the Board because it must be deemed to be erroneous by so wide a margin that no other conclusion is possible. Apparently it is thought that in extreme cases the Court is to substitute its judgment for that of the Local Board. . . .

The file is convincing that this relator has been given a full and complete opportunity to present his contentions, and the only possible basis upon which the writ could be sustained would be that of disagreement with the conclusions of the Local Board.

. . .

It is a constant temptation to think of those whose opinions and conclusions differ from our own, as being at least arbitrary and capricious. The processes of the Court, however, are not available for the gratification of such beliefs, even if they exist.

Once the "no evidence" rule is adopted, the court is necessarily faced with the problem of reviewing the evidence. Since in most Selective Service cases there is no available record of all the facts and evidence which properly entered into the judgment of the board, it follows that it is impossible for a court to determine whether or not there was any evidence before the boards. At the same time, when the "no evidence" rule is applied, the result will usually be the application of the "substantial evidence" rule, which has been generally rejected.

In considering the reasons why the "fair hearing" rule announced by this court is the proper rule, certain fundamental features of the Selective Service System must be reviewed. The selection of men for the armed forces is in no way an adversary proceeding. This has been expressed as follows:

You [local boards] are not a court for the adjustment of differences between two persons in controversy. You are agents of the Government . . . and there is no controversy. (Second Report of the Provost Marshal General on the 1917 Act, p. 283.)

The second point to be considered is that local boards and boards of appeal are selected for their knowledge and understanding of conditions which affect the equities of individual classifications. Boards are not to ignore matters of common knowledge as to general conditions and such matters need not and cannot be reduced to writing and included in every registrant's file. In fact, the regulations (Sec. 627.24(b)) specifically provide that the board of appeal shall consider general information available to it concerning economic, industrial, and social conditions.

Another feature is that the boards are not required to make findings of fact. This must be considered in connection with the rule that the boards need not accept sworn statements submitted by registrants as true, even though no contrary or impeaching evidence appears in the file. *Chin Yow v. United States*, 208 U. S. 8, 12.



Still another element to be considered is the necessary element of informality which accompanies the work of Selective Service boards. There are approximately 30,000,000 registrants within the age group liable for military service who have had to be classified and reclassified under changing statutes and regulations. Between July 1, 1942, and April 1, 1944, there were 56,086,271 classification actions taken by local boards. It will be remembered that the board members are volunteers, that they are usually not lawyers, and that they are not provided with the facilities for making stenographic reports of their proceedings.

These considerations are of special importance when matters of judgment are involved, as is usually the case in Selective Service classifications. Thus, in considering the deferment of a farmer, the boards must decide whether the registrant is "necessary to" an agricultural occupation and whether a "satisfactory replacement can be obtained." These facts can ordinarily never be conclusively established one way or the other. It is only through the application of the judgment of the local board and board of appeal to the facts as shown by the registrant's file in the light of the general information available to them that the classification is made.

We believe that the "fair hearing" rule announced by this court is not only correct as a matter of law but that it provides ample protection to registrants. In view of the many procedural safeguards contained in the Selective

Service process, any review by a court beyond the issue of a fair hearing would be a substitution of the court's judgment for that of the duly constituted boards as to the facts in the case.<sup>2</sup>

**C. In Determining Whether an Inductee Has Been Denied "Due Process" in His Classification, the Judicial Inquiry Must Be Directed to the Character of the Hearing Afforded by the Board of Appeal, Since the Board of Appeal's Classification Supersedes That of the Local Board.**

The Regulations (Sec. 627.26) provide that the board of appeal shall classify the registrant, which means that

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<sup>2</sup>This court has analyzed in detail the scope of judicial review in deportation cases in *Bridges v. Wixon*, decided June 26, 1944. It was there stated that such review is limited to a consideration of denial of due process, the same as in Selective Service cases. However, it was also stated that there would be a denial of due process if the court was unable to find "any evidence" in the record to support the action of the Attorney General. However, as we have heretofore suggested, this "no evidence" rule, while applicable in deportation cases, is not an appropriate test in Selective Service cases.

This is true largely because of the difference in the procedure in deportation cases from that in Selective Service classifications. A deportation hearing is an adversary proceeding. Evidence is received, similar to that received in a court proceeding, and transcripts are kept of the evidence. The number of such cases is small, as compared to Selective Service cases, and trained, paid personnel is available. There is no necessity for speedy determinations as in Selective Service cases. Findings of fact and conclusions of law are usually made in deportation cases. Ordinarily, questions of judgment are not involved in deportation cases to the extent that they are present in Selective Service classifications. In deportation cases the administrators are not usually faced with considering matters of common knowledge as to labor, social, and economic conditions, plus the relative and changing needs of the armed forces, as is true in Selective Service cases. Thus, even if the same "no evidence" rule were thought to be applicable to Selective Service cases as well as to deportation cases, it could not be applied in anything like the same manner.

There is the additional factor that deportation is in the nature of a penalty. When an American is called to serve his country in the armed forces, he is not being in any sense penalized but is merely being called to perform a fundamental obligation of citizenship. It is this distinction, of course, that permits the classification system to operate in the summary manner necessary for the speedy raising of an army and navy, even though it results in the courts being unable to review the proceedings to the same extent that such review is had in deportation cases.

the board of appeal acts *de novo*. This situation was described as follows in *United States v. Pitt, supra*:

An appeal board is bound in nowise to award to the registrant the classification given to him by his local board. In fact, an appeal board must hear and dispose of each case *de novo* in the same manner as must an appellate tribunal on an appeal in admiralty . . . Each appeal board therefore independently imposes a classification upon a registrant without regard to that which was given him by his local board. Moreover the classification of the appeal board supersedes that of the local board.

The action of the board of appeal was discussed as follows in "*Due Process*" and the *Selective Service System, supra*:

The Board of Appeal reviews the record *de novo*, so to speak. That is to say, the Regulations require that the Board of Appeal *classify* the registrant following exactly the same progression of classification as was followed by the Local Board except that it may not give consideration to Class IV-F because of physical or mental disability. The Board of Appeal is in every respect a higher classifying agency and is not in any sense a board of review. The Board of Appeal is required to address itself to the question of what is the registrant's proper classification rather than to the question whether or not the classification of the Local Board was correct. (pp. 445-6.)

The same matter was considered in *Judicial Review of Selective Service Board Classifications by Habeas Corpus*, *supra*, where it was said:

It should be noted also that the Selective Service Regulations provide that the appeal board shall review all the evidence which was before the local board plus that which the local board rejected, and make a decision *de novo* as to the proper classification for the registrant . . . If he has taken an appeal to the appeal board, the conduct of the appeal board only is subject to examination by the court in determining whether a fair hearing has been given. If the local board should deny the hearing it is required to give and arbitrarily places the registrant in Class I-A, an appeal from this classification to the appeal board conducted in accordance with the regulations cures the action of the local board. . . . (p. 837.)

In *Bowles v. United States*, 319 U. S. 33, the Supreme Court recognized and applied this rule, holding that the alleged illegal action of the board of appeal was immaterial in view of the later and controlling determination made on appeal to the President. See also concurring opinion of Mr. Justice Rutledge in *Falbo v. United States*, 320 U. S. 549, 555.

The reason for having the board of appeal classify the registrant *de novo* is found in the necessity for expeditious action in the selection and induction of men. By requir-



ing the registrant to submit all of his complaints to the board of appeal and by giving the board of appeal full and complete classifying power, it is possible to protect a registrant adequately and at the same time to bring the classification process to the necessary early conclusion.

It will be noted that the Regulations (Sec. 627.12) provide that the registrant may direct the board of appeal's attention to all irregularities which the local board may have committed and the registrant is provided without cost the assistance of an attorney, the government appeal agent, in perfecting his appeal. The registrant may also, of course, have the help of his own attorney in preparing his appeal. If the registrant fails to take advantage of this opportunity to advise the board of appeal of the alleged irregularities by the local board, it may not be said that he has exhausted his administrative remedies. When the registrant does present his allegations of irregularity to the board of appeal, they are necessarily passed on when the board of appeal acts. If the board of appeal finds that the alleged irregularities are such as to make it impossible for it to classify the registrant fairly, the board of appeal will return the case to the local board with proper instructions. (Sec. 627.23.) The question of whether the registrant was denied due process will then be resolved solely by determining whether the board of appeal accorded the registrant's case fair consideration.

D. Under Such a Rule of Review, viz.: The Fair Hearing Rule, the Action of the District Court Quashing the Writ, Dismissing the Proceedings and Remanding Appellant Must Be Affirmed Because Appellant Does Not, and Cannot, Contend That He Was Denied a Fair Hearing by the Board of Appeal, or Even the Local Board.

1. *Appellant does not allege, claim or specify that the Selective Service boards have refused to receive and consider evidence submitted by him as a registrant.*

Aside from the rule that the appeal board's classification supersedes that of the local board (*supra*, p. 23), appellant has never claimed at any time during the entire proceedings, nor has he now specified as error, that the Selective Service boards have refused to receive and consider evidence submitted by him. His basic complaint, as will be hereinafter noted, is that there is no evidence to support the local board's decision.

As a matter of fact any such contention on his part would be fallacious because it is apparent that the local board, appeal board, and State Director of Selective Service at all times did their utmost to allow appellant as a registrant to present to them whatever he desired in the way of evidence in support of his position. No purpose would be served by referring to the record to point out specifically the conscientious action on behalf of all Selective Service officials involved because, as stated, no claim is made that a fair hearing was not granted.

Appellant does quote the correct rule of review from the *Stanziale* case (Br. 12), but states that he believes it "too broad." Tacitly, he admits its validity but erroneously denies its authoritative value in this case. He cites the

case as good authority for another point (Br. 11) and does not attempt to criticize it by anything more than the valueless and general remark.

Appellant does contend (Br. 28) that the appeal board was arbitrary, capricious, and erroneous in its actions simply because there were in the file sent up by the local board three Statements of Personal Privilege [R. 84, 88, 96]. Therefore, appellant argues, the board of appeal considered those statements and because appellant was not advised that the Statements were in the file or given an opportunity to meet any allegations therein, the appeal board's action was erroneous and arbitrary. It should be carefully noted that that complaint is the only one directed against the appeal board. Even without any examination of the Statements, or the facts concerning their presence in the file, it is submitted that their mere presence is certainly not evidence that the appeal board did not act fairly and honestly. Further consideration will be given the matter hereinafter, but it must be presumed that the appeal board, in the absence of evidence to the contrary, considered such statements in their proper perspective.

2. *In reviewing the action of the board of appeal to determine whether it afforded the registrant a fair hearing, it must be presumed, in the absence of evidence to the contrary, that the board of appeal acted fairly and honestly.*

It is, of course, unnecessary to cite authorities for the above rule. However, see *Graf v. Mallon* (C. C. A. 8), 138 F. (2d) 230, 235, and *United States v. Kinkead* (D. C. N. J.), 248 Fed. 141, 145.



There is, nevertheless, a constant temptation to assume that what is believed to be a wholly erroneous draft classification is proof of the denial of a fair hearing by the board of appeal, but it should be remembered that lack of a fair hearing is not established by showing error. *Chin Yow v. United States*, 208 U. S. 8. It may be contended that it is most difficult to produce evidence that a board of appeal has not fairly considered a registrant's case, if evidence of erroneous classification is not considered as sufficient to overcome the presumption of fairness. We concede that such proof is difficult to obtain, and it is difficult because the boards of appeal in fact do act fairly and impartially. Proof of a nonexistent fact is always difficult to obtain.

The experience under the 1917 Act demonstrated that boards of appeal are entitled to the full force and effect of this presumption of regularity and fairness. The work of boards of appeal, then known as district boards and given original jurisdiction over occupational deferments, was described as follows:

. . . they provided a check on irregularities by local boards, promoted uniformity in the application of the law, and assured to every registrant the opportunity of a rehearing before a court removed from local prejudice and influence. . . . These responsible and burdensome obligations demanded the selection of members not only representative of the leading divisions of our population, but possessed of experience, breadth of view, and executive ability.

. . .

The immediate infusion into the selective service system of this group of able and highly patriotic civilians went far in itself to vindicate the wisdom



of intrusting to local agencies the raising of our armies. . . .

The rule of the district boards commanded attentive study by all large employers of labor and became of vital interest to the farmer as the supply of labor waned. It was then that the caliber of the district boards received its severest test, and that its members performed their most valuable service to the country. (Second Report of the Provost Marshal General on the Operation of the 1917 Act, pp. 268-9.)

The same is true under the 1940 Act. This is illustrated, we believe, by the fact that after almost four years under the 1940 Act and the induction of millions of registrants there are only two reported habeas corpus cases in which the courts have ordered inductees released from the armed forces where board of appeal action has been involved.<sup>3</sup>

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<sup>3</sup>These two cases are *United States ex rel. Phillips v. Downer* (C. C. A. 2), 135 F. (2d) 521, which involved a question of statutory interpretation, and *Application of Greenberg* (D. C. N. J.), 39 F. Supp. 13, which was criticized in *United States ex rel. Tranin v. Cain*, *supra*, and Bullock, *Judicial Review of Selective Service Classifications by Habeas Corpus*, *supra*. The only other reported cases in which the courts have released inductees from the armed forces under the 1940 Act, aside from cases involving forcible inductions (see *Billings v. Truesdell*, 321 U. S. 542), are *United States ex rel. Beye v. Downer* (C. C. A. 2), 143 F. (2d) 125 (The local board had disregarded the requirement that a rejected registrant be reclassified, resulting in a denial of appeal); *United States ex rel. Degraw v. Toon* (D. C. E. D. N. Y.), 52 F. Supp. 170 (The local board did not grant a personal appearance before reclassification following discharge from service. An appeal by the government to the Circuit Court of Appeals is pending in this case.); *United States ex rel. Bayly v. Reckard* (D. C. Md.), 51 F. Supp. 507. (The local board disregarded the order of call.) In addition, there is the case of *United States ex rel. Reel v. Badt* (C. C. A. 2), 141 F. (2d) 845, which was remanded for further evidence and which is still pending. It should also be noted that the unreported case of *United States ex rel. Swatzka v. Sullivan* (D. C. W. D. Wash.), decided June 1, 1944, is now before this court on appeal by the government, the District Court having ordered Swatzka's release from the Army because of what it found to be an illegal denial of an agricultural deferment.

Our inquiry should end here because appellant neither averred or charged that the board of appeal, or even the local board, refused to receive and consider evidence submitted by appellant as a registrant. There is certainly no evidence that they acted unfairly, dishonestly, arbitrarily, or capriciously. The trial court, with the appellant and the entire draft board file before it, could not find that either the appeal board or the local board acted in an arbitrary and capricious manner [R. 112]. But, as hereinbefore noted in the discussion of appellee's position, we will go even further than we deem necessary, to argue that even under the scope or rule of review proposed by appellant the decision of the trial court should be affirmed.

**E. Even if the Scope of Review Proposed by Appellant Is Accepted as the Proper Rule to Be Invoked in This Case, the District Court Did Not Err and Its Action Should Be Affirmed.**

1. *The rule of review proposed by appellant.*

It is difficult to determine exactly which rule of review appellant stands upon. His attention to the rule endorsed in the *Stanziale* case has been already considered (*supra*, p. 27). We do not believe it wrong to state that appellant, at this point at least, properly endorsed that rule, and, as noted, the acceptance thereof should end this case. However, appellant does state that the rule in *Benesch v. Underwood* (C. C. A. 6), 132 F. (2d) 430, "would seem" to be the correct one (Br. 12). It should be noted though that the "substantial evidence" rule quoted by appellant was taken by the *Benesch* opinion from *Rase v. United States* (C. C. A. 6), 129 F. (2d) 204, a criminal

case, and that actually the *Benesch* case made the following finding:

“We find here, as we did in our previous decision cited, no evidence of arbitrary or capricious conduct on the part of the draft boards, or a failure by the draft boards to afford a full and fair hearing. On the contrary, the record reveals scrupulous and proper official conduct on the part of both the local board and the board of appeals.”

Therefore, the actual finding in the *Benesch* case indicates an adherence to at least the spirit of the rule in the *Stanziale* case rather than to the “substantial evidence” rule. On the other hand, contentions by appellant throughout his brief indicate a preference to the “no evidence” rule, without clearly defining which rule he actually advocates.

In either case, the merit of appellee’s position that the proper rule is the “fair hearing” rule is shown when the application of the other rules to the particular situation presented in this case is attempted. The court herein is clearly called upon to re-litigate the matter without having before it all the evidence which was before the local board and board of appeal. And, in effect, appellant is asking the courts to reclassify him. Admittedly that is a function which the courts have no power to perform.

2. *Answer to Point I of appellant’s argument.*

A careful analysis of Point I of appellant’s argument (Br. 8-30) discloses that all of his contentions thereunder may be summed up by stating that he asserts that the



local board's classification was made without *any* evidence to support it.<sup>4</sup>

The court will presume that the findings of the boards were based upon substantial evidence and were not arbitrarily or capriciously made. Therefore, the burden is on the registrant to establish the contrary. *Graf v. Mallon, supra*. Appellant has, it is submitted, not only failed to support that burden but the boards' action is supported by substantial evidence and is therefore not arbitrary or capricious.

Previously in this brief certain elements or fundamental features of the Selective Service System were reviewed.<sup>5</sup> All those elements must be carefully considered in this case where it is alleged that the boards were arbitrary because the evidence did not warrant the classification.

It is normally not possible for a court to have before it all the facts which properly enter into the action of the boards; for example, the oral testimony given by appellant on October 12, 1943. Even when it is possible, it

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<sup>4</sup>Subdivision 1 (Br. 9-11) concerning an alleged violation of the Act and Regulation is based on the argument that there is no evidence to support the reclassification under Regulation 622.25. Subdivision 2 (Br. 11-16) directly states that the local board's decision was not supported by any substantial or competent evidence. Subdivision 3 (Br. 17-28) contends, in effect, that because the local board's decision was without any evidence to support it, it acted in an arbitrary, unfair, and capricious manner. Joined to that subdivision is the only reference appellant cares to make regarding the appeal board's action, and it is argued that because certain statements were in the file before the appeal board, it must have considered the same. Therefore, its action was, appellant argues, arbitrary and capricious. Subdivision 4 (Br. 29) argues that the local board abused its discretion and exceeded its authority in a final decision unsupported by evidence save the opinions and conclusions of the South Dakota War Board. Subdivision 5 (Br. 30) alleges a denial of due process because of all the previous grounds of error.

<sup>5</sup>The selection of men for the armed forces is in no way an adversary proceeding. 2. Local boards and boards of appeal are selected for their knowledge and understanding of conditions which affect the equities of individual classifications. 3. Boards must have the element of informality; *e.g.*, no facilities for making stenographic reports. 4. Selective Service classifications usually involve matters of judgment. 5. The boards are not required to make findings of fact.



usually develops that there is, at the most, only an error in classification. This does not establish a denial of a fair hearing (*Chin Yow v. United States, supra*), or arbitrary and capricious action.

Turning to the evidence before the Selective Service boards, substantial evidence is found to support the classification. In the first place, it is admitted by appellant that the local board might consider certain matters relating to its previous classification of the registrant [R. 109, 110; Br. 40] which are not before this court. It is fundamental that where an appeal court is called upon to review the findings of a trial court because its conclusion of fact is opposed to the evidence, all the evidence adduced must be presented to the reviewing court, and, in the absence of a proper showing that all the evidence is thus presented, it will be assumed that other evidence not so presented was adduced and justified and required the conclusion reached. *Tricon v. Helvering* (C. C. A. 9), 68 F. (2d) 280, cert. den., 292 U. S. 655.

Further, the board may consider the sincerity, good faith, and veracity of the registrant. *Ex parte Stewart* (D. C. S. D. Calif.), 47 F. Supp. 410; *United States ex rel. Errichetti v. Baird* (D. C. N. Y.), 39 F. Supp. 388; *United States ex rel. Ursitti* (D. C. N. Y.), 39 F. Supp. 872. And even if the board's decision was based principally upon discrediting the registrant's testimony that does not of itself justify the conclusion that the determination of the board was improper. *United States ex rel. Cameron v. Embrey* (D. C. Md.), 46 F. Supp. 916.

Appellant bases his entire charge of lack of evidence on the letters from the United States Department of Agriculture War Board, Douglas County, South Dakota, referred to as the "DeVelder correspondence." Appellee

cannot agree that the "only possible support" for the action of the local board and the appeal board is to be found in the said letters (Br. 19). As pointed out by the trial court in its decision [R. 109, 111] and by appellee herein, matters confront the local boards which cannot be made available for a review of their action. But admittedly the letters were important, and it is believed that they constitute substantial evidence.

These letters were sent to the local board upon its request [R. 56]. They are not letters presented to the local board by some self-chosen or voluntary investigative agency, but constitute the assistance given to the local boards in reaching their determinations upon the recommendations of the National Headquarters of the Selective Service System [Br. App. 9] and upon the authority of Regulation 621.7.

Most, if not all, of appellant's complaint against the letters is directed to the fact that they could have been better and that some further investigation might have been made. Assuming for argument the truth of such charge, this evidences merely another attempt on the part of appellant to relitigate the entire matter or test the matter as an adversary proceeding. The fact that the evidence might have been more substantial or that it directed the attention of the local board to other evidence is an argument made properly before the boards and incompetently before the courts.

After complaining about the merits of the letter of August 18, 1943 [R. 55], appellant sluffs off the letter of October 30, 1943 [R. 62], by saying it was a gratuitous gesture and not based on facts (Br. 24). This latter letter it should be noted is a report from the War Board made after carefully investigating and checking the rec-

ords of the registrant. True it does not state the records checked nor the investigating done, but it is a definite and forthright answer from a governmental agency specified to give such answers.

Appellant by adroit, although faulty, logic contends that the chairman of the local board fell into a violation of paragraph 6 of The Bulletin (Br. 25) when the chairman wrote that the report from the U.S.D.A. War Board made it "almost mandatory" to classify registrant in I-A, and that he carried along with him the other members of the board. The fact that two members did not follow or that the appeal board could not be charged with such a mandatory position is not mentioned. The trial court in its decision fully answers the contention by holding that "by the pointing out of one item or error are we to conclude that all of the rest of the evidence was discarded" [R. 111] and "if it is possible that the local board arrived at an erroneous deduction, then the appeal board should have certainly corrected the erroneous deduction" [R. 112].

Mention should be made of the contention that the appeal board was guilty of unfair, arbitrary, and capricious action because the Statements of Personal Privilege were in the file (Br. 28). The answer to that contention may be more conveniently handled hereinafter (*infra*, p. 39) when those Statements are considered.

As a matter of law, because the action of the local board is superseded by that of the board of appeal, any question of arbitrary and capricious action must be limited to that of the appeal board. And it should be noted also that no charge of such conduct is attributed to the State Director of Selective Service.



**F. The District Court Did Not Commit Any of the Errors Claimed by Appellant in Points II, III, and V of His Argument, but if Any Errors Were Committed, None of Them Were Prejudicial to the Appellant.**

1. *Answer to Point II of appellant's argument.*

Appellant in his Point II (Br. 31) specifies as error the statement made by the trial court that the action of the appeal board supersedes the action of the local board [R. 104]. That the trial court was entirely correct is shown by the opinions in *Bowles v. United States, supra*, and *United States v. Pitt, supra*, and other authorities cited under Point "C" herein. It is contended that the trial court under authority of the *Bowles* case could have gone even further because the ruling of the State Director of Selective Service had superseded the action of the appeal board.

However, it would seem that the statement by the court, even if erroneous, would not be prejudicial in this matter because that court considered the records on its merits [R. 104] and directly found in accordance with what appellant agrees is the proper theory; *i.e.* that the local board and the board of appeal did not act in an arbitrary and capricious manner [R. 112]. The entire opinion of the court [R. 100-112] is replete with evidence that the trial court did consider the action of the local board in arriving at its decision.

2. *Answer to Point III of appellant's argument.*

Appellant in his Point III (Br. 34) specifies as error the court's holding regarding the ruling that the local board had complied with Section 627.13 of the Regulations concerning a written Summary.



It is questionable whether a written Summary need have been made at all in the matter. Section 621.13 requires "if any facts considered by the local board do not appear in the written information in the file," the Summary should be prepared and filed. It is significant that *no error is claimed because the board did not file the Summary*. The only error claimed is that answers [Statements of Personal Privilege: R. 84, 88, 96] to the written statement were made and placed in the file without advising appellant that such had been done and without giving him an opportunity of meeting any of the statements therein. This, appellant urges, is proof of arbitrary and capricious action on the part of the board.

Even more questionable is whether the statement made by the registrant should have been in the file at all. The fact that the local board allowed the statement to go in is an indication of the extreme lengths it went to to allow a complete and fair hearing.

A reading of the Summary of Oral Matters [R. 72] immediately discloses that the purpose of the statement was to present to the appeal board the registrant's charge of prejudice and unfairness. The particular point made of the entire matter is another indication of appellant's insistence in making an adversary proceeding of the entire matter. There is no known right to contradict or refute a summary, if this be one, or to continue the argument after the hearing. The registrant wanted to make a written statement regarding his treatment at the oral hearing; some of the members of the board wanted to deny the insinuations and charges therein. It would appear that to forbid the members of the board to deny the insinuations would be manifestly unfair.

It is pertinent at this point to mention again the basis for the only charge made against the board of appeals; *i. e.*, its alleged consideration of the three statements of Personal Privilege [R. 84, 88, 96] without allowing appellant to meet the statements therein. A cursory reading of the statements in answer to appellant's Summary indicates the correctness of the trial court's belief that the appeal board could separate the wheat from the chaff [R. 109]. It appears to appellee that what appellant is getting at indirectly is a claim of prejudice on the part of the Selective Service boards. His Summary [R. 72] indicates such an attitude, and the fact that the only charge of arbitrary and capricious action leveled against the appeal board is made solely on the basis of a presumed consideration of the three Statements is further evidence thereof. One of the main reasons for having boards of appeal is to cure any possible error caused by such prejudice, and it is difficult to conceive of a case in which all the members of the board of appeal would be prejudiced against a registrant. Certainly nothing in this case would indicate such prejudice on the part of the appeal board.

3. *Answer to Point V of appellant's argument.*

Appellant in his Point V (Br. 40) claims that the trial court made a certain erroneous holding regarding manpower requirements when as a matter of fact the court made no holding whatsoever on that point. The trial court specifically noted that "the regulations provide that [quotas] shall not influence their judgment" [R. 110].

It did not hold that the local board could consider the manpower requirements nor did it take such requirements into consideration in arriving at its decision. The matter was mentioned in passing and it was obviously not prejudicial.

### Conclusion.

For the foregoing reasons, we contend the decision below should be affirmed.

Respectfully submitted,

CHARLES H. CARR,  
*United States Attorney.*

JAMES M. CARTER,  
*Assistant United States Attorney.*

ARTHUR LIVINGSTON,  
*Assistant United States Attorney.*







## APPENDIX.

### Selective Service Regulations.

621.1 *Mailing Questionnaires.* (a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

621.2 *Time allowed to return Questionnaire.* (a) Unless the local board grants an extension of time, as explained below, the registrant shall complete and return his Selective Service Questionnaire (Form 40) within 10 days after the date on which it is mailed to him. \* \* \*

(b) If the registrant has a valid reason, the local board may grant an extension of time for returning the Selective Service Questionnaire (Form 40). Examples of valid reasons are:

Too sick to answer the Selective Service Questionnaire (Form 40).

Too far away to receive and return the Selective Service Questionnaire (Form 40) by mail within 10 days.

621.3 *Special Form for Conscientious Objector* \* \* \*

621.4 *Claims, for, or information relating to, deferment.* \* \* \*

621.5 *Inadequate Questionnaire.* \* \* \*

621.6 *Assistance to registrants in filling out Questionnaires.* Advisory boards for registrants will help registrants fill out Selective Service Questionnaires (Form 40).

The local board shall request newspapers to publish full information about the advisory boards for registrants. Registrants who ask the local board for advise or assistance will be directed to members of the advisory board for registrants.

621.7 *Securing information from welfare and governmental agencies.* (a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.

(b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant. \* \* \*

\* \* \* \* \*

623.1 *General principles of classification.* (a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board or as soon as practicable after the time allowed for him to return his Selective Service Questionnaire (Form 40) has expired.

(b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed.

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 *Information considered for classification.* The registrant's classification shall be made solely on the basis

of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file; \* \* \*. Oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in registrant's file.

\* \* \* \* \*

623.61 *Classification and change of classifications.*

(a) As soon as practicable after the local board has classified or changed the classification of a registrant, it shall mail a notice thereof on a Notice of Classification (Form 57) to the registrant. \* \* \*

\* \* \* \* \*

625.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.



(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a per-

son to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on

the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

\* \* \* \* \*

627.1 *Who may appeal any determination of a local board to a board of appeal at any time.* (a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State, may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.

627.2 *Who may appeal registrant's classification to board of appeal under certain circumstances.* (a) The registrant, any person who claims to be a dependent of a registrant, any person who has filed written evidence of the occupational necessity of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

\* \* \* \* \*

627.12 *Statement of person appealing.* The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement



specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 *Local board to transmit record to board of appeal.* (a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

(b) Immediately upon determining that all steps required by the regulations have been taken and that the record is complete, the local board shall transmit the file to the board of appeal, provided that the State Director of Selective Service may direct the channels through which such file shall be forwarded to the board of appeal.

\* \* \* \* \*

627.23 *Preliminary review.* The board of appeal will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's



classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the board of appeal to determine the classification of the registrant, the board of appeal shall return the file to the local board with proper instructions. If the board of appeal returns the file to the local board, it shall enter the date of the return in column 4 of the Docket Book of Board of Appeal (Form 102).

627.24 *Review by board of appeal.* (a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under section 627.25, and (2) general information concerning economic, industrial, and social conditions.

\* \* \* \* \*

627.26 *Decision of board of appeal.* (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant; provided that the board of appeal shall not give consideration to Class IV-F because of physical or mental disability.

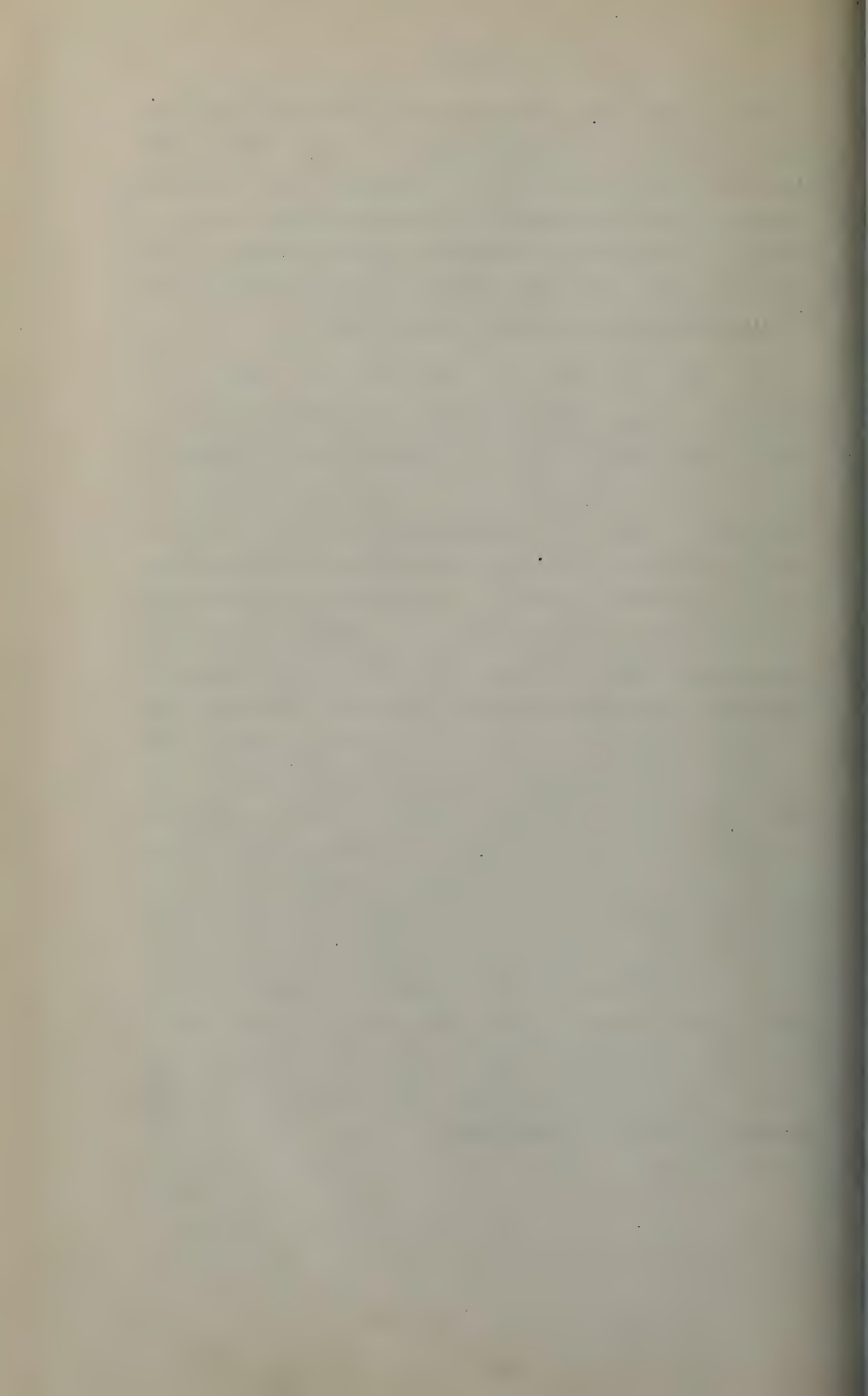
(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

\* \* \* \* \*

628.1 *Who may appeal to the President from any determination of a board of appeal.* (a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

\* \* \* \* \*

628.2 *Appeal to the President.* The registrant or any person who claims to be a dependent of the registrant or any person who has filed written information as to the occupational status of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57), notifying the registrant that the local board classification has been affirmed or changed, may appeal to the President provided the registrant was classified by the board of appeal in either Class I-A, Class I-A-O, or Class IV-E and one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 10-day period herein provided for such an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board permits such an appeal, the right of such persons to appeal to the President shall terminate at the end of the 10-day period herein provided.



**Nos. 10784-10785**

**IN THE**

**United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

---

**UNITED STATES OF AMERICA,**

**Appellant,**

**vs.**

**CONSOLIDATED ROCK PRODUCTS CO., a corporation,  
UNION ROCK COMPANY, a corporation,  
and CONSUMERS ROCK & GRAVEL COMPANY,  
INC., a corporation,**

**Appellees.**

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**TRANSCRIPT OF RECORD**

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**Upon Appeals from the District Court of the United States  
for the Southern District of California,**

**Central Division**

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**FILED**

**NOV 11 1944**

**PAUL P. O'BRIEN,  
CLERK**



No. 10784

No. 10785

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

vs.

CONSOLIDATED ROCK PRODUCTS CO., a corporation,  
UNION ROCK COMPANY, a corporation,  
and CONSUMERS ROCK & GRAVEL COMPANY,  
INC., a corporation,

Appellees.

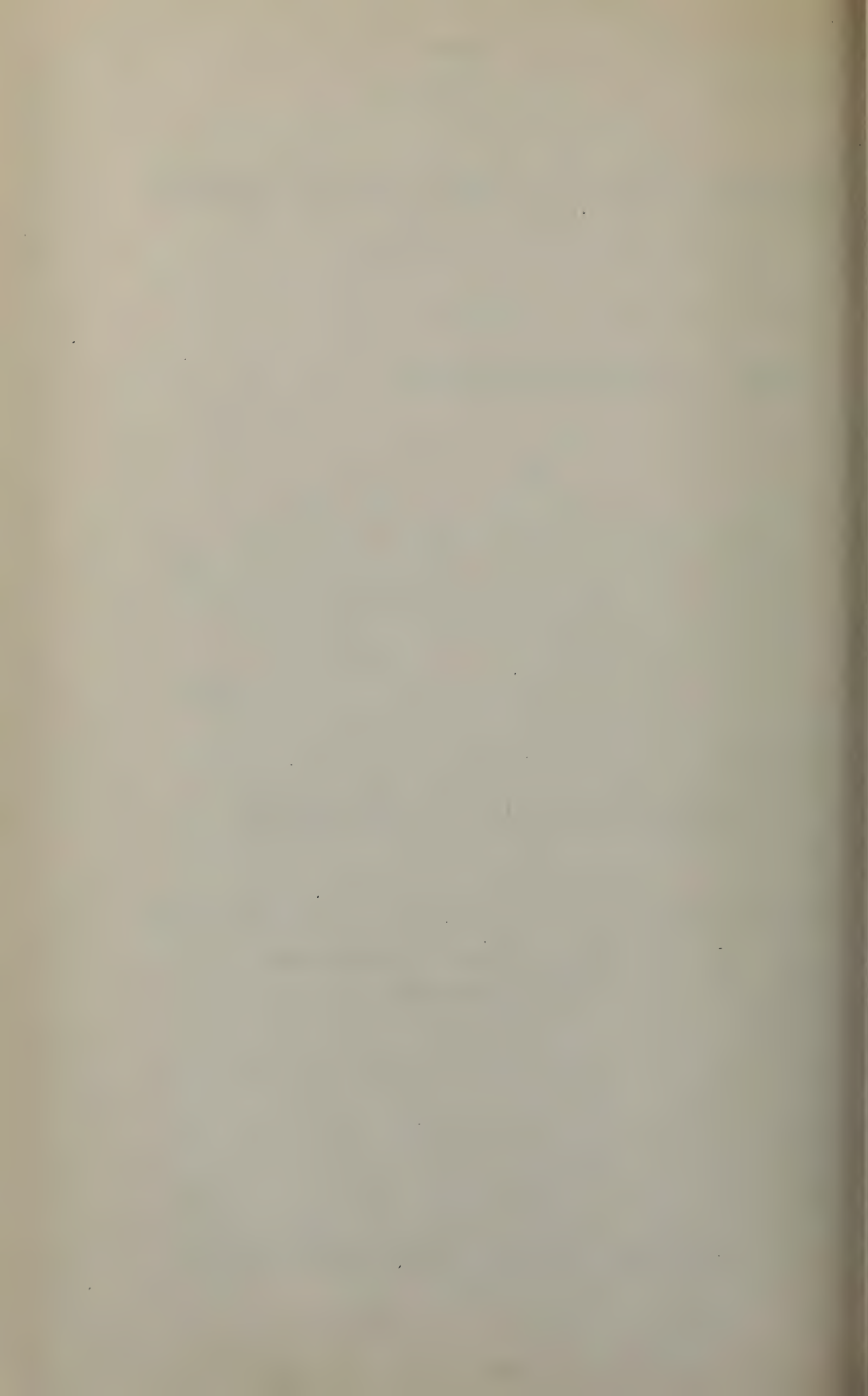
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## TRANSCRIPT OF RECORD

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Upon Appeals from the District Court of the United States  
for the Southern District of California,  
Central Division

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No. 10784

IN THE

**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

vs.

CONSOLIDATED ROCK PRODUCTS CO., a corporation,  
UNION ROCK COMPANY, a corporation,  
and CONSUMERS ROCK & GRAVEL COMPANY,  
INC., a corporation,

Appellees.

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**TRANSCRIPT OF RECORD**

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---

## NAMES AND ADDRESSES OF ATTORNEYS:

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\*Page number appearing at foot of Certified Transcript.



In the District Court of the United States for the  
Southern District of California  
Central Division

In Proceedings for the Reorganization of a Corporation.

No. 25816-H

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO.,  
a Delaware Corporation,

Debtor

### PETITION

To the Honorable, the Judges of the District Court of  
the United States for the Southern District of California,  
Central Division:

The petition of Consolidated Rock Products Co., a corporation organized and existing under the laws of the State of Delaware (hereinafter called the Debtor), under Section 77-B of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States." approved July 1st, 1898, and Acts amendatory thereof and supplementary thereto (hereinafter called the "Bankruptcy Act"), respectfully shows:

1. That Debtor is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having been incorporated under said laws on or about the 28th day of January, 1929. The Debtor is a commercial corporation which could become a bankrupt under Section 4 of this Act, and is not a municipal, railroad, insurance or banking corporation or a building and loan association. The principal place of business of the Debtor during the preceding six months and for a period long prior thereto has been in the City of Los Angeles,

State of California, and its principal assets are located in the County of Los Angeles, California and within the territorial jurisdiction of the United States District Court for the Southern District of California, Central Division, and the interest of all parties concerned will [2] best be served by filing this petition in said territorial jurisdiction.

2. The nature of the business of the Debtor is that of producing, handling, and selling sand, rock, and gravel and other building materials throughout Southern California.

3. In brief description, the assets, liabilities, capital stock and financial condition of the Debtor are as follows:

(a) The principal assets of the Debtor as of December 31st, 1934 consisted principally of stocks of subsidiary companies whose properties are being operated by Debtor, and certain bunkers, trucks and other properties owned directly by Debtor. In addition, the Debtor had as of said date \$117,000.00 in cash; accounts and notes receivable of \$111,000.00; inventories of \$69,000.00, and prepaid items of \$86,000.00, making a total of current assets of \$385,000.00. The said assets are listed in the schedule attached hereto as Exhibit "A" and made a part hereof as though fully herein set forth. Since said date of December 31st, 1934 there has been no substantial change in the character or amounts of said assets except as to the cash. The amount of cash now held by the corporation is approximately \$80,000.00.

(b) The liabilities of the Debtor and its subsidiaries as of December 31st, 1934 consisted of—

\$117,128.17 of current accounts payable and accrued items other than bond interest;

Purchase money obligations on a bunker site and a gravel deposit, \$53,000.00;

In addition, there was then outstanding \$1,877,000.00 par value of 6% serial and sinking fund gold bonds of Union Rock Company and \$1,137,000.00 par value of first mortgage sinking fund gold bonds of Consumers Rock and Gravel Company, Inc., both wholly owned subsidiaries of Debtor;

In addition thereto there is interest past due on the aforesaid bonds in the sum of \$219,140.00. [3]

The Debtor is not directly liable for either principal of or interest on said bonds. The direct liability is that of the respective subsidiaries. There may be a corresponding liability on the part of Debtor to said subsidiaries. If such liability exists it grows out of an operating agreement dated July 15th, 1929, effective as of April 1st, 1929, as modified by an agreement dated February 16th, 1933 between Debtor and its subsidiaries. All of said liabilities, including those of the subsidiaries under their respective bond indentures and including other general and miscellaneous expenses and liabilities, are more fully set forth in the schedule hereto annexed as Exhibit "B" and made a part hereof as though fully herein set forth. Said exhibit shows

the liabilities as of December 31st, 1934 and there have been no substantial changes in the character or amounts thereof except for an item of additional interest which has accrued under said bond indentures since said date.

(c) The capital stock of the Debtor as of December 31st, 1934 was as follows:

Cumulative and participating preferred stock with dividends at the rate of \$1.75 per share per annum, with no par value and with liquidating value of \$25.00 per share; 300,000 shares are authorized and 285,947 shares thereof have been issued and are now outstanding.

No par value common stock, 700,000 shares authorized, 397,455 shares issued and outstanding, total stated value \$1.00.

(d) The financial condition of the Debtor is substantially as set forth in Exhibits "A" and "B" hereto attached, the only material changes therein since the date of said exhibits being a reduction of cash to approximately \$80,000.00 as hereinbefore set forth, and the increase in accrued interest under the bond indentures therein mentioned. If, under the aforesaid operating agreement, there exists an obligation on [4] the part of the Debtor to meet interest and principal as they mature under said bond indentures, there is clearly an excess of matured liabilities of the Debtor over current assets and said excess is continuing to increase.

4. No prior proceeding in bankruptcy is pending.



5. The facts showing the need for relief under Section 77-B of the aforesaid Bankruptcy Act and in addition to those set forth in paragraph 3 hereof relating to the financial condition of the Debtor, are as follows:

(a) The bondholders under the aforesaid bond indentures are insisting that principal and interest on their bonds be paid or that sale take place under their trust indentures.

(b) There are rents and royalties in a large amount accruing each month on the properties now being operated by Debtor. Debtor is withholding payment of said rents and royalties in an effort to preserve its cash and to continue as a going concern until some plan of reorganization can be effected. Said lessors may at any time take action to cancel said leases or to enforce the payment of rental thereunder from Debtor unless proceedings are taken to stay such action on their part.

(c) There are taxes in substantial amounts accruing on both leasehold and fee properties and some of said properties on which such taxes are accruing are not now necessary for proper operation of Debtor's properties.

(d) As a result of the operating agreement of July 15th, 1929 and the modification thereof on February 16th, 1933, there is a controversy between bondholders and the Debtor as to whether any money is due thereunder from the Debtor to said subsidiaries and as to the amount thereof if any sums are due thereunder. [5]

(e) Due to greatly depressed business conditions in the industry in which Debtor is engaged there has

been and is an insufficient volume of business to enable the Debtor to meet its obligations and those of its subsidiaries as they mature. Neither is it possible under such conditions for the present stock structure of Debtor to be supported or maintained.

(f) The Debtor has insufficient funds to pay its obligations now due and its current income is insufficient to pay the interest and other expenses and sums accruing upon its obligations and those of its subsidiaries at the rate now borne thereby. The assets of the Debtor have a value in excess of the amount which could be realized at this time upon a sale of such assets or the liquidation of the Debtor. If the Debtor is not reorganized the rights and interests of its creditors and stockholders will be seriously impaired.

6. The Debtor is unable to meet its debts as they mature and desires to effect a plan of reorganization pursuant to Section 77-B of Chapter VIII of the Acts of Congress relating to Bankruptcy.

7. The Debtor believes that the appointment of a Trustee or Trustees of this estate would involve unnecessary expense and that in order to avoid such unnecessary expense and make possible continuity of management of its properties, Debtor should be continued in possession of its estate during the pendency of this proceeding under such terms and conditions as the Court may deem proper. In this connection the Debtor has obtained the consent of a committee representing said respective bondholders to such temporary possession and control.

8. This petition is executed and filed by the Debtor pursuant to a resolution duly adopted by the Board of Directors of the Debtor at a meeting thereof duly held on the 20th day of [6] May, 1935 as shown by the certificate of a Vice-President of the Debtor attached hereto and made a part hereof as Exhibit "C".

Wherefore, your petitioner prays that an order may be made and entered herein:

(1) Approving this petition as properly filed in good faith under Section 77-B, Chapter VIII of the Acts of Congress relating to Bankruptcy.

(2) Pending further order of this Court in the premises that the Debtor shall continue in possession of its property, shall operate its business, shall have all of the title of, and shall exercise consistently with the provisions of said Section 77-B of said Bankruptcy Act, all of the powers of a Trustee appointed pursuant to Section 44 of said Bankruptcy Act, and the same powers as those exercised by a Receiver in equity, to the extent consistent with Section 77-B of said Bankruptcy Act, all subject, at all times, to the control of this Court.

(3) Requiring the Debtor to give such notice as the order may direct to creditors and stockholders, and to cause publication thereof to be made at least once a week, for two successive weeks, of the hearing to be held as prescribed in said Act, within thirty days after the approval of this petition, to determine whether or not the Court shall continue the Debtor in possession or appoint a Trustee or Trustees.

(4) Enjoining all persons, firms and corporations from instituting, commencing, prosecuting, or con-

tinuing the prosecution of any actions, suits, or proceedings at law or in equity, or under any statute, against the Debtor, or to enforce any lien or claim upon the estate or property of the Debtor, and from levying or serving any garnishments, attachments, executions, or other process upon or against the Debtor [7] or any of its property, and that all persons, firms and corporations be enjoined from doing any act in any way interfering with the property or business of the Debtor.

(5) Fixing the time within which the Debtor shall report to the Court as to the advisability of rejecting any contracts of the Debtor, executory in whole or in part.

(6) Granting such other and further relief, general and special, as may be provided for in said Section 77-B and other provisions of said Act to which Debtor may be justly entitled.

[Seal] CONSOLIDATED ROCK PRODUCTS CO.

By Robt. Mitchell

Vice-President.

LATHAM, WATKINS & BOUCHARD

By PAUL R. WATKINS

Attorneys for the Petitioner. [8]

[Verified.] [9]



## EXHIBIT "A"

## Current:

Cash in banks and on hand.....	\$ 117,615.56
Accounts and notes receivable (trade \$129,650.34; rents, claims, and other \$17,132.80) net after provision for bad debt losses and discounts.....	111,478.12
Inventories of rock, sand, gravel (at basic cost rates established in 1932) and building materials at lower of cost or market .....	69,371.33
Prepaid items, including insurance and taxes (\$36,972.65) and operating sup- plies \$46,818.14) .....	86,624.51
Current Assets .....	<hr/> \$ 385,089.52
Service deposits and noncurrent notes re- ceivable .....	737.60
Interest in net worth of controlled com- pany .....	30,822.22
Properties, consisting of lands, deposits, plants, structures, and machinery and equipment (including automobiles and trucks) at values authorized by the board of directors of the parent company and made effective October 1, 1931, plus subse- quent additions at cost, less provision for depreciation and depletion.....	3,020,047.13
Deposits held on lease, at nominal reap- praised value of October 1, 1931.....	1.00

Trust deed note receivable (on gravel deposit) and accrued interest, at present uncollectible .....	48,401.32
Taxes and street improvement assessments paid in 1934 on property covered by above trust deed, plus foreclosure filing fee.....	5,203.59
Account receivable from allied trade corporation (majority of capital stock thereof held under assignment) reduced to a carrying value of \$1.00 pending developments .....	1.00

## Other Assets:

Bond redemption (\$184.25  
and special (\$3,461.00)  
funds in hands of trustees \$ 3,645.25

Deferred charges applicable  
to 1935 ..... 9,513.18

Sundry stocks and bonds at  
approximately 25% of cost,  
value unknown ..... 10,159.33

Unamortized bond discount  
and expense ..... 170,848.57

Reorganization expense ..... 17,257.00

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211,423.33

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\$3,701,72.671

## EXHIBIT "B"

Current accounts payable (\$58,495.29) and accrued items (\$58,632.88) other than bond interest .....	\$ 117,128.17
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Purchase money obligations (on a bunker  
site and a gravel deposit) originally pay-  
able in:

1933....\$11,500.00*	1935 .....\$17,000.00	
1934.... 11,000.00*	1936-38.... 13,500.00	53,000.00
<hr/>	<hr/>	
\$22,500.00	\$30,500.00	
<hr/>	<hr/>	

\*Payments extended by agreement.

Accrued interest on bonds:

Union Rock Company, from September 1, 1933.....	\$ 150,920.00	
Consumers Rock and Gravel Company, Inc., from January 1, 1934.....	68,220.00	219,140.00
	<hr/>	

General provision for sundry unascertained liabilities and for amounts contingently payable .....	36,985.24
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Funded debt:

Union Rock Company, first  
mortgage 6% serial and  
sinking fund gold bonds,  
authorized \$5,000,000.00,  
issued \$2,500,000.00, re-  
tired \$520,500.00, pur-  
chased and held in the  
treasury \$102,500.00:

Outstanding:

Matured September 1,  
1933, \$57,000.00, less  
\$1,000.00 held in treas-  
ury..... \$56,000.00

Matured

September

1, 1934 59,000.00 \$ 115,000.00

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Maturing September 1,  
1935, after \$10,000.00  
retired in 1930..... 50,000.00

Maturing 1936 to 1947 1,712,000.00

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\$1,877,000.00

Consumers Rock and  
Gravel Company, Inc.,  
first mortgage sinking  
fund gold bonds, au-  
thorized \$2,500,000.00,  
issued \$1,500,000.00, re-  
tired \$299,500.00, pur-  
chased and held in  
treasury \$63,500.00:

Outstanding, maturing

July 1, 1948..... 1,137,000.00 3,014,000.00

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\$3,440,253.41



EXHIBIT "C"

I, Robert Mitchell, Vice-President of Consolidated Rock Products Co., hereby certify that the following is a true copy of the preamble and resolutions adopted by the Board of Directors of said corporation at a meeting duly called and held, at which a quorum was present and acting throughout, on May 20th, 1935, and such resolutions are now in full force and effect, to-wit:

"The Board of Directors was advised by counsel that Section 77-B of the Bankruptcy Act was designed to facilitate and expedite the reorganization of commercial corporations. There was considerable discussion of various plans of reorganization and the advisability of filing a petition under said Section 77-B before the Board of Directors approved any plan of reorganization.

"Whereupon, on motion duly made, seconded and unanimously carried, the following resolutions were adopted:

"Be It Resolved, that the proper officers of this corporation be and they are hereby authorized, empowered and directed to file a petition for reorganization under and in accordance with the provisions of Section 77-B of said Bankruptcy Act;

"Be It Further Resolved, that said officers be and they are hereby authorized, empowered and directed to execute such petitions and other instruments, and to take or cause to be taken such proceedings as

may be necessary or desirable to secure for this corporation any and all relief which it may be entitled to, under, and in pursuance of Section 77-B of the Bankruptcy Act.”

In Witness Whereof, I have hereunto subscribed my signature to this certificate, and affixed the seal of this corporation on this 24th day of May, 1935.

[Seal]

ROBT. MITCHELL

Vice-President.

[Endorsed]: Filed May 24 - 1935. [12]

[Title of District Court and Cause.]

## ORDER

Upon due consideration of the petition of Consolidated Rock Products Co., the above named Debtor, verified May 24th, 1935, and filed herein on May 24th, 1935, for relief under the provisions of Section 77-B of Chapter VIII of the Acts of Congress relating to Bankruptcy, and having heard the arguments of counsel for the Debtor, who being present, waived notice of the hearing on said petition, being fully advised in the premises and being satisfied that such petition complies with said Section 77-B and has been filed in good faith, and that no notice need be given to the other parties interested herein, upon motion of Latham, Watkins & Bouchard, counsel for the Debtor, it is hereby ordered, adjudged, and decreed as follows:

1. That the said petition be and it is hereby approved as properly filed in good faith under Section 77-B of Chapter VIII of the Acts of Congress relating to Bankruptcy.

2. That the Debtor is unable to meet its debts as they mature.

3. That by reason of the facts set forth in said petition, the Debtor requires relief under said Section 77-B and had no adequate remedy save through the granting of such relief.

4. That the Debtor shall continue temporarily in possession of its properties, shall operate the business thereof, and shall and may exercise, consistently with the provisions of Section [13] 77-B of an Act entitled "An Act to Establish a Uniform System of Bankruptcy through-

out the United States," approved July 1st, 1898, as amended and supplemented (hereinafter referred to as the "Bankruptcy Act"), all of the powers of a Trustee appointed pursuant to Section 44 of said Bankruptcy Act and the same powers as those exercised by a receiver in equity, to the extent consistent with Section 77-B of said Bankruptcy Act, all subject to the control of this Court.

5. The Debtor is hereby further authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate, and keep in proper condition and repair, the assets, properties and business of the Debtor, wherever situated, and to manage, operate and conduct its business and, to this end, to exercise its authority and franchises and discharge all duties obligatory upon it, and to employ and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, issues and profits of said assets, properties and business; to collect all outstanding accounts and all dividends and interest on securities belonging to it, to aid and assist its subsidiary corporations as may be necessary to protect the Debtor's interest therein, to continue, until further order of this Court, the existing purchasing, selling, operating, business and financial agreements, arrangements and relations of the Debtor with its subsidiary corporations, to the extent that they may be necessary or advisable, in order that the properties of the Debtor and its subsidiary corporations may be operated as nearly as may be with the same policy of management, all in the same manner that it would be entitled and bound to do in its own right, and, to the extent necessary, to protect and preserve the assets, properties and business



of the Debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. [14]

6. That the Debtor and its officers are authorized, from time to time, until further orders of this Court, out of the funds heretofore, or hereafter, coming into the possession of the Debtor, to pay all necessary current expenses of the Debtor in operating, managing and preserving the assets and properties and conducting the business of the Debtor and its subsidiaries, including specifically, without limiting the generality of the foregoing, wages, salary and compensation of all officers, accountants, managers, superintendents, agents, employees, or counsel retained, or hired, by the Debtor, necessary rents, such ordinary capital expenditures as may be necessary for the proper conduct of the business of the Debtor, the costs of maintaining the corporate existence of the Debtor, including the necessary expenses of the preservation of the records and the registration and transfer of its stock and bonds and the charges of the Trustees under indentures under which securities of the Debtor and any of its subsidiaries have been issued, and the expenses of preparing and printing pleadings, petitions, orders, proposed plans pursuant to Section 77-B of the Bankruptcy Act, and all other papers now filed, or hereafter to be filed, herein, which are reasonably necessary to be printed in such quantity as shall provide copies for the use of the Court, the Debtor, parties to the cause, and such others as may have a substantial interest therein, and to hold any additional moneys that may come into the possession of the Debtor and be not expended for any of the aforesaid purposes, all subject to the further order of this Court.

7. That the Debtor shall give notice to the creditors and stockholders of the Debtor of a hearing to be held before this Court in the Courtroom of the United States District Court for the Southern District of California, Central Division, Judge Hollzer's Courtroom in the Federal Building, Temple and Main Streets, Los Angeles, California, on the 24 day of June, 1935, at 10 o'clock A. M. [15] to determine whether or not this Court shall continue the Debtor in possession or appoint a Trustee, or Trustees, by mailing on or before June 10th, 1935, notice of such hearing, postage prepaid, to each creditor and stockholder of the Debtor appearing as such upon the books or records of the Debtor, addressed to such creditor or stockholder, at his address as it appears upon said books and records, and by publication thereof once a week for two successive weeks in one daily newspaper published and of general circulation in Los Angeles County, California, the last publication to be not later than June 17, 1935. Such notice shall be sufficient if substantially in the form set out in Schedule "A" hereto attached.

8. That all persons, firms and corporations are hereby enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceeding at law or in equity, or under any statute, against the Debtor, or to enforce any lien or claim upon the estate or property of the Debtor, and from levying or serving of garnishments, attachments, executions or other process upon or against the Debtor or any of its property, and from doing any act in any way interfering with the as-

sets, property or business of the Debtor, until after the entry of the final decree herein, and all sheriffs, marshals and their officers, and their advisors, representatives and servants, are hereby enjoined and restrained from seizing, selling, removing, transferring, disposing of, or attempting in any way to seize, sell, remove, transfer or dispose of, or in any way to interfere with any properties, assets or effects in the possession of the Debtor, or owned by the Debtor, and from doing any act whatsoever to interfere with the possession and management by the Debtor of the assets, property and business of the Debtor.

9. That the officers of the Debtor are hereby authorized to make any and all payments and to draw any and all checks, in the ordinary conduct of the business of the Debtor, and to open and/or [16] maintain bank accounts in such bank, or banks, as may have heretofore been, or as may hereafter be, selected by the Board of Directors of the Debtor, and to exercise such authority and control over said bank accounts as may have been heretofore granted, or as may hereafter be granted, to said officers by the Board of Directors of the Debtor.

10. That the Debtor shall be allowed until July 15th, 1935, unless the time be extended further by order of this Court, within which to report to the Court as to the advisability of rejecting any contracts of the Debtor, executory in whole or in part; and continued operation by the Debtor, under any of said contracts within said period allowed for such reports or any extension thereof and until the entry of an order directing such rejection, shall



not be deemed to conclude this Court or the Debtor in respect of such election or to constitute an election.

11. That the Debtor shall close its present books of account as of midnight, May 24, 1935, and the Debtor shall open new books of account as of midnight, May 24, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers for all payments made upon account thereof, and deposit the moneys coming into the possession of the Debtor in any of the banks in which the funds of the Debtor are presently deposited and/or in such other banks as shall be selected and approved by this Court.

12. That not later than June 10, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of midnight, May 24, 1935, as of which date the books of the Debtor shall be closed for the purposes of this proceeding.

13. That the Debtor shall file with the Clerk of this Court on or before the 20th day after the last day of each calendar [17] month a statement of the assets and liabilities of the Debtor as of the last day of the preceding month, together with a summary statement of the revenues and expenses of the Debtor for such month.

14. That the schedules and other information required by Section 77-B of the Bankruptcy Act to be filed, or submitted, for the purpose of disclosing the conduct of the Debtor's affairs and the fairness of any proposed plan of reorganization, shall be filed, or submitted,



by the Debtor at such time, or times, as the Court may direct, and this Court reserves full right and jurisdiction, from time to time, to direct the Debtor to file any such schedules, or information, or to dispense with the filing, or submission of the same.

15. That this Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedules and submit such information as may be required to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, determining a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced, and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed, or evidenced, and allowed, and, for the purposes of any proposed plan and its acceptance, the classification of creditors and stockholders into classes according to the nature of their respective claims and interests, and, in general, such orders amplifying, extending, limiting, or otherwise modifying or amending this order, as to the Court may, at any time, seem proper.

Dated, May 24, 1935.

WM. P. JAMES

District Judge. [18]

## SCHEDULE "A"

Notice. In the District Court of the United States  
for the Southern District of California

No. 25816-H

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO.,

Debtor.

To the Creditors and Stockholders of the Debtor:

The petition of Consolidated Rock Products Co., (hereinafter called the "Debtor"), for a reorganization and for relief under Section 77-B of the Bankruptcy Act, has been approved as properly filed under said section, and an order was filed in these proceedings on May 24, 1935, temporarily continuing the Debtor in possession of its properties and authorizing the Debtor to operate its business pending further order of the Court.

Notice Is Hereby Given, pursuant to the aforesaid order dated May ....., 1935, of a hearing to be held before the District Court of the United States, for the Southern District of California, in room ..... of the Federal Building, Temple and Main Streets, Los Angeles, California, on the ..... day of June, 1935 at ..... o'clock .... M. to determine whether or not the Court shall continue the Debtor in possession or appoint a Trustee, or Trustees.

Dated: May ....., 1935.

CONSOLIDATED ROCK PRODUCTS CO.

By.....

Vice-President

[Endorsed]: Filed May 24 - 1935. [19]

[Title of District Court and Cause.]

### ORDER

This Court, by its orders filed herein on May 24th, 1935, having temporarily continued the debtor in possession of its property and the properties of its subsidiaries Union Rock Company, a Delaware corporation, and Consumers Rock & Gravel Company, Inc., a Delaware corporation, and having provided for certain other and further relief, and having directed the debtor to give notice of a hearing to be held before this Court in the courtroom of the United States District Court for the Southern District of California, Central Division, Judge Hollzer's courtroom, in the Federal Building, Temple and Main Streets, Los Angeles, California, on the 24th day of June, 1935, at 10:00 o'clock A. M. to determine whether or not the Court shall continue the debtor in possession or appoint a trustee or trustees, and proof having been made of the due publication and the mailing of said notice of hearing, as directed in the said orders, and these proceedings having come on for further hearing at the place and time above mentioned, and the Court having heard the arguments of Gibson, Dunn & Crutcher and O'Melveny, Tuller & Myers, counsel respectively for the bondholders' committees of Consumers Rock & Gravel Company and Union Rock Company, and counsel for debtor, being fully advised in the premises and being satisfied that the debtor should be continued in possession of its properties and business and the properties and business of its subsidiaries Union Rock Company and Consumers [34] Rock & Gravel Company, Inc., upon motion of Latham, Watkins & Bouchard, counsel for the

debtor, it is hereby ordered, adjudged and decreed as follows:

(1) That the debtor, pending further order of this Court, shall be continued in possession of its properties and the properties of its said subsidiaries, shall operate the business thereof, and shall have and may exercise, consistently with the provisions of Section 77-B of an Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, as amended and supplemented (hereinafter referred to as the "Bankruptcy Act"), all of the powers of a trustee appointed pursuant to Section 44 of said Bankruptcy Act, and the same powers as those exercised by a receiver in equity, to the extent consistent with Section 77-B of said Bankruptcy Act, all subject to the control of this Court, and without prejudice to the right of any bondholder, bondholders' committee, or other creditor, or any stockholder of the debtor or any subsidiary of the debtor, at any time during the pendency of this proceeding, to petition this court for the appointment of a trustee or trustees of the properties of the debtor and its subsidiaries, and this court hereby reserves jurisdiction to make such appointment pursuant to any such petition upon such showing, hearing, and notice as this court may deem sufficient.

(2) That the debtor herein be and hereby is authorized and directed, pending further order of this Court, to run, manage, maintain, operate, and keep in proper condition and repair, the assets and property of the debtor and its said subsidiaries, whether or not in this Southern District of California, and to manage, operate, and conduct the business of the debtor and its said subsidiaries, both within and without the Southern District of Cali-



fornia, and, to this end to exercise its and their authority and franchises and discharge all duties obligatory upon it and them, and, subject to the compensation of certain officers and employees of the corpora- [35] tion, and subject to the further provision that no person shall be elected or appointed to any office to fill a vacancy, or otherwise, without the prior approval of this Court, and further subject to the power of this Court to fix and determine the reasonable compensation for services rendered and reimbursement for actual and necessary expenses incurred in connection with this proceeding, by officers, parties in interest, depositaries, reorganization managers and committees, or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor and its said subsidiaries, to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to collect and receive the income, rents, revenues, issues and profits of said assets, properties and business, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to aid and assist its subsidiary corporations as may be necessary to protect the debtor's interests therein, to continue, until further order of this Court, the existing, purchasing, selling, operating, business and financial agreements, arrangements and relations of the debtor and its said subsidiary corporations to the extent that they may be necessary or advisable in order that the properties of the debtor and its subsidiary corporations may be operated as nearly as possible with the same policy of management, all in the same manner that it would be entitled and bound to do in its own right and to the extent necessary to protect and preserve the assets, prop-

erties, and business of the debtor, all according to law and subject to such supervision and control of the Court as the Court may exercise by further orders entered herein, and, after provision for current expenses of the debtor in operating, managing, and preserving the assets and properties and conducting the business of the debtor, including specifically, without limiting the generality of the foregoing, salaries, wages, and compensation of all officers, accountants, managers, superintendents, agents, employees, attorneys or counsel, retained [36] or hired by the debtor, as aforesaid, the necessary rents or royalties, the cost of materials consumed in current operations, and insurance, Federal, State and municipal taxes, and the cost of water, light, heat, gas, and power, and, after provision for such ordinary capital expenditures as may be necessary for the proper conduct of the business of the debtor and its said subsidiaries, and the costs of maintaining the corporate existence of the debtor and its said subsidiaries, including the necessary expenses of the preservation of the records and the registration and transfer of its stock and bonds and the charges of the trustees under indentures under which securities of the debtor's subsidiaries have been issued, and the expenses of preparing and printing pleadings, petitions, orders, proposed plans pursuant to Section 77-B of the Bankruptcy Act, and all other papers now filed, or hereafter to be filed, herein, which are reasonably necessary to be prepared or printed in such quantity as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein and to hold any additional moneys that may come into the possession of the debtor and be not expended for any

of the aforesaid purposes, all subject to the further order of this Court.

(3) That the officers of the debtor are hereby authorized to make any and all payments and to draw any and all checks, in the ordinary conduct of the business of the debtor, and to open and/or maintain bank accounts in such bank, or banks, as may have heretofore been, or as may hereafter be, selected by the Board of Directors of the debtor, and to exercise such authority and control over said bank accounts as may have been heretofore granted, or as may hereafter be granted, to said officers by the Board of Directors of the debtor.

(4) That the debtor shall be allowed until July 15th, 1935, unless the time be extended further by order of this Court, within which to report to the Court as to the advisability of rejecting any contracts of the debtor, executory in whole or in part; [37] and continued operation by the debtor, under any of the said contracts within said period allowed for such reports or any extension thereof and until the entry of an order directing such rejection, shall not be deemed to conclude this Court or the debtor in respect of such election or to constitute an election.

(5) That all persons, firms and corporations are hereby enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity, or under any statute, against the debtor, or to enforce any lien or claim upon the



estate or property of the debtor, and from levying or serving of garnishments, attachments, executions or other process upon or against the debtor or any of its property, and from doing any act in any way interfering with the assets, property or business of the debtor, until after the entry of the final decree herein, and all sheriffs, marshals and their officers, and their advisors, representatives and servants, are hereby enjoined and restrained from seizing, selling, removing, transferring, disposing of, or attempting in any way to seize, sell, remove, transfer or dispose of, or in any way to interfere with any properties, assets or effects in the possession of the debtor, or owned by the debtor, and from doing any act whatsoever to interfere with the possession and management by the debtor of the assets, property and business of the debtor.

(6) That the debtor shall cause to be kept in its books of account opened as of midnight May 24th, 1935, due and proper accounts of its earnings, expenses, receipts, and disbursements, and shall preserve proper vouchers for all payments and disbursements.

(7) That the debtor shall file with the Clerk of this Court, on or before the 20th day after the last day of each calendar month, a statement of the assets and liabilities of the debtor as of the last day of the preceding month, together with a summary [38] statement of the revenues and expenses of the debtor for such month.

(8) That the schedules and other information required by Section 77-B of the Bankruptcy Act to be filed, or



submitted, for the purpose of disclosing the conduct of the debtor's affairs and the fairness of any proposed plan of reorganization, shall be filed, or submitted, by the debtor at such time, or times, as the Court may direct, and this Court reserves full right and jurisdiction, from time to time, to direct the debtor to file any such schedules, or information, as to dispense with the filing, or submission of the same.

(9) That the debtor shall prepare, within thirty (30) days from the date of this order, (a) a list of all known bondholders and creditors of, or claimants against, the debtor and its said subsidiaries, or its or their properties, and the amounts and character of their debts, claims and securities, and the last known post office address, or place of business, of each creditor or claimant, and (b) a list of the stockholders of each class of the debtor, with the last known post office address or place of business of each.

(10) That the said lists, in paragraph "(9)" hereof mentioned, shall be open to the inspection of any creditor or stockholder of the debtor, or any creditor of either of said subsidiaries, during reasonable business hours, upon application to the debtor at its executive offices, 2730 South Alameda Street, City of Los Angeles, California.

(11) That this Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, determining a reasonable time within which claims

and interests of creditors and stockholders may be filed or evidenced, and after which no such [39] claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed, or evidenced, and allowed, and, for the purposes of any proposed plan of its acceptance, the classification of creditors and stockholders into classes according to the nature of their respective claims and interests, and, in general, such orders amplifying, extending, limiting, or otherwise modifying or amending this order, and any and all other orders now or hereafter made, as to the Court may, at any time, seem proper.

Dated: July 2nd, 1935.

HARRY A. HOLLZER

District Judge.

Approved as to form as provided in Rule 44.

GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland

Attorneys for Bondholders' Committee of Consumers  
Rock & Gravel Company, bondholders.

O'MELVENY, TULLER & MYERS,

By Graham L. Sterling, Jr.

Attorneys for Bondholders' Committee of Union Rock  
Company, bondholders.

[Endorsed]: Filed Jul. 3 - 1935. [40.]

[Title of District Court and Cause.]

PETITION FOR LEAVE TO FILE CLAIM FOR  
DEFICIENCY IN 1938 INCOME TAXES.

Comes now The United States of America by and through its attorneys, Wm. Fleet Palmer, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Bureau of Internal Revenue, and petitions this Court for leave to file the claim presented by the Collector of Internal Revenue on or about January 12, 1942, for deficiency in 1938 income taxes in the sum of \$25,112.72 with assessed interest of \$4071.70 with interest to accrue as provided by law on the following ground: [41]

That the Order entered by this Court on April 3, 1936, fixing a final date for filing of claims in the above entitled proceeding as of June 1, 1936, does not apply to income taxes accruing in subsequent years and during the period that the business of the taxpayer is in the custody and control of this Court.

Wherefore, Petitioner prays that this Court make an Order permitting the United States of America and its Collector of Internal Revenue to file a claim for deficiency in 1938 income taxes against the Consolidated Rock Products Co.

Dated: February 19, 1942.

WM. FLEET PALMER,  
United States Attorney,

E. H. MITCHELL,  
Asst. U. S. Attorney,

EUGENE HARPOLE,  
Special Attorney,  
Bureau of Internal Revenue,

By Eugene Harpole

Attorneys for United States of America.

[Endorsed]: Filed Feb. 19, 1942. [42]



[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE CLAIM  
FOR DEFICIENCY IN 1938 INCOME TAXES.

The Petition of the United States of America for leave to file claim for 1938 deficiency in income taxes having come regularly before the Court for hearing on March 9, 1942, the petitioner appearing by Wm. Fleet Palmer, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Bureau of Internal Revenue, its attorneys, and the Consolidated Rock Products [43] Company, as debtor in possession, by Latham & Watkins, Ronald C. Roeschlaub, its attorneys; and the Court having considered the Petition and statements of counsel,

Hereby Grants the petition of the United States of America and Orders the said United States of America and its Collector of Internal Revenue be permitted to file a claim for deficiency in 1938 income taxes against the Consolidated Rock Products Company.

It Is Further Ordered that the debtor and its counsel may have a period of one week within which to present objections to said claim.

Dated: This 9th day of March, 1942.

H. A. Hollzer

United States District Judge.

Approved as to form

Latham & Watkins

By Dana Latham

Attorneys for Debtor.

[Endorsed]: Filed Mar. 10, 1942. [44]



lector of Internal Revenue at Los Angeles, Calif.; (4) That there are no set-offs or counterclaims to said debt; (5) That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens; (6) That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon; (7) That said debt has priority, and must be paid in full in advance of distributions to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 12th day of January 1942

Nat Rogan  
Collector of Internal Revenue for the  
Sixth District of California.

Subscribed and sworn to before me this 12th day of  
January 1942

(Seal)

T. G. Albright  
Notary Public

My Commission Expires Oct. 18, 1944.

[Endorsed]: Received Jan. 14, 1942, 10:29 a. m. [45]

[Title of District Court and Cause.]

OBJECTIONS TO ALLOWANCE OF CLAIM FOR  
DEFICIENCY IN 1938 INCOME TAXES.

This Honorable Court, by its order dated March 10, 1942 in the above-entitled proceedings, granted the petition of the United States of America and its Collector of Internal Revenue, requesting authority to file a claim against Consolidated Rock Products Co., debtor in the above-entitled proceedings, for a deficiency in 1938 Federal income taxes in the amount of \$25,112.72 with assessed interest of \$4,071.70 with interest to accrue as provided by law. The said order gave debtor and its counsel a period of one week within which to present objections to the said claim.

In accordance with the said order and pursuant to Section 77B (c) (6) of the Bankruptcy Act, 11 U. S. C. A., Section 207 (1937), debtor presents herewith the following objections to the allowance of the said claim:

1. Debtor denies each and every allegation of said claim.

2. Debtor is informed and believes that the said claim is based upon the disallowance of certain income tax deductions claimed by debtor for the year 1938. Debtor respectfully submits that the [46] said disallowance of the said deductions is without any justification in fact or in law.



3. Debtor respectfully submits that the said claim is without any justification in fact or in law.

Wherefore, debtor prays that this Court disallow the said claim in its entirety.

Dated March 16, 1942.

Respectfully submitted,

CONSOLIDATED ROCK PRODUCTS CO.,

By Robt. Mitchell

President.

LATHAM & WATKINS

By RONALD C. ROSECHLAUB

Attorneys for Debtor.

[Endorsed]: Filed Mar. 16, 1942. [47]

[Title of District Court and Cause.]

## STIPULATION OF FACTS

It is hereby stipulated between the Consolidated Rock Products Co., debtor in the above entitled proceeding, and the United States of America, claimant, through their respective counsel, that the following facts may be considered in evidence at the hearing on the claim of the United States against the debtor for a deficiency in 1938 income taxes, without prejudice, however, to the right of both debtor and claimant to introduce other evidence not inconsistent herewith: [48]

### I

On November 10, 1941, a deficiency notice was mailed by the Commissioner to the debtor determining a deficiency in income tax for the taxable year ending December 31, 1938, in the amount of \$25,112.72 plus interest. A true and correct copy of said notice is attached hereto as Exhibit 1.

### II

On November 28, 1941, the tax determined by said deficiency notice, plus interest accrued to November 28, 1941, was assessed against the debtor. A certified photostatic copy of the assessment certificate and the assessment list evidencing such assessment is attached hereto as Exhibit 2.

### III

On March 9, 1942, this Court issued an order granting leave to the United States to file claim for the said deficiency against the debtor. A true copy of said Order is attached hereto as Exhibit 3.

#### IV

On March 16, 1942, the debtor filed objections to the allowance of the said claim of the United States for 1938 income taxes. A true copy of said objections is attached hereto as Exhibit 4.

#### V

On March 27, 1942, the United States filed a claim for income taxes for the taxable year 1938 against the debtor in accordance with the leave granted by said Order, Exhibit 3. A true copy of said claim is attached herto as Exhibit 5. [49]

#### VI

A certified photostatic copy of the income tax return filed by the debtor for the calendar year 1938 is attached hereto as Exhibit 6.

#### VII

The said deficiency notice, Exhibit 1, indicates that the said deficiency of \$25,112.72 was determined by making the following adjustments to net income:

#### ADJUSTMENTS TO NET INCOME

Net income (loss) as disclosed by return	(\$105,532.14)
Unallowable deductions:	
(a) Capital loss	\$ 18,341.97
(b) Expenses paid for subsidiaries	215,917.64
(c) Depreciation	23,690.83
	<hr/>
	257,950.44
	<hr/>
Total	\$152,418.30
Additional deduction:	
(d) Capital stock tax	152.00
	<hr/>
Net income adjusted	\$152,266.30

## VIII

It is stipulated that adjustment (d) pertaining to the capital stock tax is correct.

## IX

It is stipulated that adjustment (a) pertaining to capital loss is correct. [50]

## X

It is stipulated that the correct figure for adjustment (c) pertaining to depreciation is \$20,388.62, and that adjustment (c), with this figure substituted for the \$23,690.83, is correct.

## XI

It is stipulated that the taxpayer suffered a loss through flood during the year 1938 in the amount of \$15,754.92; that said loss is not reflected in its return, Exhibit 6, and that in determining the amount of tax due, if any, from the debtor for the taxable year 1938, said loss shall be allowed.

(The following paragraphs of this Stipulation pertain to item (b) of the "Adjustments to Net Income"—Expenses paid for subsidiaries.)

## XII

The debtor was incorporated under the laws of the State of Delaware in 1929 and at all times herein mentioned was a duly organized and acting corporation of said State, duly qualified to do and doing business in California.

## XIII

Attached hereto as Exhibit 7 is a chart indicating the corporate relationship of the debtor and its various sub-



sidiaries. Such corporate relationship has been in effect at all times herein relevant from 1929 through the year 1938 to date.

#### XIV

In 1929 and 1930 the debtor entered into "Operating Agreements" with certain of the above named subsidiary corporations. [51] Copies of said Agreements are attached hereto as Exhibits as follows:

Builders Crushed Rock Products Company	Exhibit	8
Consumers Rock & Gravel, Inc.*	"	9
Reliance Rock Company*	"	9
Sunset Rock Products Company, Inc.	"	10
Union Rock Company*	"	9

\*A single agreement was entered into with Consumers, Reliance and Union.

#### XV

On February 16, 1933, the debtor entered into a "Modification of Operating Agreement" with the Consumers Rock & Gravel Company, Inc., the Reliance Rock Company and the Union Rock Company, a true copy of which is attached hereto as Exhibit 11. No notice of extension was ever given as provided for in the said "Modification of Operating Agreement".

No modification was made of the other operating agreements referred to, supra as Exhibits 8 and 10.

#### XVI

On May 24, 1935, petitions for reorganization under Section 77-B of the Bankruptcy Act, 11 U. S. C. A. Section 207 (1937), were filed in the above entitled Court on behalf of debtor and two of its subsidiaries, Con-

sumers Rock & Gravel Company, Inc. and Union Rock Company, and the debtor was temporarily continued in possession of the assets of all three corporations by this Court.

The said three petitions and the Orders of this Court entered on May 24, 1935, temporarily continuing the debtor in possession of the business, assets and properties of the debtor and the said two subsidiaries are all incorporated herein by reference. [52]

Under date of July 2, 1935, this Court entered its formal order continuing debtor in possession of the business, assets and properties of debtor and its said two subsidiaries until further order of the Court. A copy of the said Order of July 2, 1935, is attached hereto as Exhibit 12. The said Order of July 2, 1935, has been in effect continuously from July 2, 1935, through 1938 and down to the present time.

## XVII

On November 20, 1935, the debtor filed a "Petition for Approval of Revised and Modified Leases". On February 6, 1936, this Court by Order granted said Petition. Said Petition and said Order are incorporated herein by reference, subject to objection on the part of the debtor as to relevancy and materiality.

## XVIII

The item which is in dispute here, namely item (b) of the Adjustments to Net Income, "Expenses paid for Subsidiaries", set forth in Paragraph VII, *supra*, totalling \$215,917.64, is an item deducted in item 22 of the debtor's 1938 income tax return, Exhibit 6 hereof and supporting

schedule. It is equal to the claimed depreciation, depletion and amortization of the properties which were and are owned by the debtor's subsidiaries. The claimed depreciation and depletion in part relate to original investments made by the subsidiaries, and in part to expenditures made by the debtor with respect to the subsidiaries' property. The \$215,917.64 item is broken down by the following tables: [53]

#### DEPRECIATION

<u>Subsidiary</u>	<u>Depreciation of Invest- ment of Subsidiary</u>	<u>Depreciation of Expendi- tures of Consolidated</u>	<u>Total</u>
Atlas Mixed Mortar Co.	\$ 55.67	\$ None	\$ 55.67
Builders Crushed Rock Products Company	3,879.72	324.98	4,204.70
Consumers Rock & Gravel Company, Inc.	72,309.25	27,215.56	99,524.81
Reliance Rock Company	13,810.52	None	13,810.52
Sunset Rock Products Company, Inc.	19,652.43	None	19,652.43
Union Rock Company	38,623.85	22,289.82	60,913.67
Union Rock Land Company	697.25	2,000.98	2,698.23
	<hr/>	<hr/>	<hr/>
Totals	\$149,028.69	\$ 51,831.34	\$200,860.03
	<hr/>	<hr/>	<hr/>

#### DEPLETION

<u>Subsidiary</u>	<u>Depletion of Invest- ment of Subsidiary</u>	<u>Depletion of Expendi- tures of Consolidated</u>	<u>Total</u>
Consumers Rock & Gravel Company, Inc.	\$ 7,090.12	\$ None	\$ 7,090.12
Union Rock Company	52.34	596.70	649.04
Union Rock Land Company	3.90	4.26	8.16
	<hr/>	<hr/>	<hr/>
Totals	\$ 7,146.36	\$ 600.96	\$ 7,747.32
	<hr/>	<hr/>	<hr/>

AMORTIZATION OF LEASEHOLDS

<u>Lease being Amortized</u>	<u>Amortization with respect to invest- ment of Subsidiary</u>	<u>Amortization with respect to expendi- tures of Consolidated</u>	<u>Total</u>
Builders Crushed Rock Products Co.	\$ 1,250.00	\$ None	\$ 1,250.00
Union Rock Company	5,288.46	None	5,288.46
	<hr/>	<hr/>	<hr/>
Total	\$ 6,538.46	\$ None	\$ 6,538.46
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>

[54]

RECAPITULATION

<u>Item</u>	<u>Deduction with respect to the in- vestment of Subsidiaries</u>	<u>Deduction with respect to the ex- penditures of Consolidated</u>	<u>Total</u>
Depreciation	\$149,028.69	\$ 51,831.34	\$200,860.03
Depletion	7,146.36	600.96	7,747.32
Amortization of Leaseholds	6,538.46	None	6,538.46
	<hr/>	<hr/>	<hr/>
Total	\$162,713.51	\$ 52,432.30	\$215,145.81*
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>

\*The difference between the \$215,917.64 figure referred to in Paragraph XVIII and the \$215,145.81 figure shown *supra* lies in the disallowance of certain claimed depletion and amortization of leaseholds, which disallowance the debtor concedes is correct.

The expenditures above referred to as expenditures of Consolidated, are expenditures which, had they been made by Consolidated on its own property, or by the subsidiaries on their respective properties, should properly have been treated as capital expenditures by Consolidated or the subsidiaries respectively instead of as current expenses.



While the correctness of the amounts of depreciation, depletion and amortization, are in dispute between the parties, it is agreed that for the sole purpose of this hearing involving only the questions of law raised by this claim, the above figures may be assumed to be correct; such agreement is solely for the purpose of litigating the issues of law herein involved and is in no way an agreement as to the facts for any other purpose. [55]

## XIX

At all times herein mentioned each of the above named corporations was a duly organized and existing corporation and was qualified to do and was doing business in California.

## XX

Federal income tax returns for all years from the dates of their incorporation to date, including all years since 1929, have been duly filed for the above named corporations.

## XXI

True and correct copies of the income tax returns of the following corporations for the calendar year 1938 are attached as exhibits hereto and are numbered as follows:

Atlas Mixed Mortar Company	Exhibit 13
Builders Crushed Rock Products Co.	" 14
Consumers Rock & Gravel Co., Inc.	" 15
Reliance Rock Company	" 16
Sunset Rock Products Company, Inc.	" 17
Union Rock Company	" 18
Union Rock Land Company	" 19

## XXII

It is hereby agreed that this Stipulation is entered into solely for the purpose of this hearing on the issues of law here involved, and no part hereof shall in any way be considered as agreed to for any other purpose, and specifically no part hereof shall be considered as agreed to for any subsequent hearing on any question of fact arising out of this claim, the purpose of this stipulation being solely to present to the court the issues of law here involved. [56]

Dated: This 6th day of November, 1942.

LATHAM & WATKINS

By Ronald C. Rosechlaub

Attorneys for Debtor.

WM. FLEET PALMER, United States Attorney.

E. H. MITCHELL, Asst. U. S. Attorney.

EUGENE HARPOLE, Special Attorney,  
Bureau of Internal Revenue.

SAMUEL TAYLOR, Special Attorney,  
Bureau of Internal Revenue,

By Samuel Taylor

Attorneys for Claimant. [57]

[EXHIBIT 1.]

Form 7900

Revised May 1939

12th Floor,  
U. S. Post Office and Court House,  
Los Angeles, California.

Los Angeles

LA:Conf:PB

Consolidated Rock Products Co.,  
2730 South Alameda Street,  
Los Angeles, California.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1938 discloses a deficiency of \$25,112.72 as shown in the statement attached.

Said tax is being assessed against you under the provisions of existing internal revenue laws applicable to bankruptcies and receiverships. Pursuant thereto no petition for redetermination may be filed with the United States Board of Tax Appeals after the adjudication of bankruptcy or the appointment of a receiver.

Attention is called to the rights and priorities of the United States under Section 64(a) or other applicable provisions of the Bankruptcy Act, as amended, and under section 3466 of the Revised Statutes. Section 3467,

Revised Statutes, as amended by section 518 of the Revenue Act of 1934, imposes personal liability upon every executor, administrator, assignee, or other person who, in paying debts of the person or estate for whom or for which he acts, fails to observe the priority in payment prescribed by law in favor of the United States.

The collector is authorized to file proof of claim for any tax liability in bankruptcy and receivership cases.

The filing of proof of claim will not prejudice an application to this office for reconsideration of the above-mentioned tax. In order to facilitate adjustment of objections raised, a protest, executed in triplicate and under oath, stating in detail the grounds for your exceptions, may be submitted to this office within thirty days from the date of this letter. Affidavits or other data supporting such exceptions should be transmitted therewith. If desired, a conference with this office may be requested.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE D. MARTIN

Internal Revenue Agent in Charge.

Enclosure:

Statement.



STATEMENT

LA:Conf:PB

Consolidated Rock Products Co.,  
2730 South Alameda Street,  
Los Angeles, California.

Tax Liability for the Taxable Year Ended  
December 31, 1938

	Liability	Assessed	Deficiency
Income tax	\$25,112.72	None	\$25,112.72

This determination of your income tax liability has been made upon the basis of information on file in this office.

A copy of this letter and statement has been mailed to your representative, Mr. Dana Latham, 1112 Title Guarantee Building, 411 West Fifth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file in the Bureau.

ADJUSTMENTS TO NET INCOME

Net income (loss) as disclosed by return (\$105,532.14)  
Unallowable deductions:

(a) Capital loss	\$ 18,341.97	
(b) Expenses paid for subsidiaries	215,917.64	
(c) Depreciation	23,690.83	257,950.44
	<hr/>	<hr/>
Total		\$152,418.30

Additional deduction:

(d) Capital stock tax	152.00
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Net income adjusted	\$152,266.30
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### EXPLANATION OF ADJUSTMENTS

(a) The amount of \$20,341.97 claimed as loss from the sale or exchange of property other than capital assets represents loss from the sale or exchange of capital assets, and the amount of \$1,492.34 reported as capital gain represents gain from the sale or exchange of property other than capital assets; section 117(a)(1), Revenue Act of 1938. The deduction of \$20,341.97 is reduced to \$2,000.00 in accordance with the provisions of section 117(d) of the Act, resulting in the disallowance of \$18,341.97. [59]

(b) The deduction of \$484,214.40 claimed for "expenses paid for subsidiaries" includes the following items which are not with respect to properties owned by you and which are not deductible by you:

Depreciation	\$200,860.03
Depletion	8,394.17
Amortization of leaseholds	6,663.44
Total	\$215,917.64

(c) The amount of depreciation allowable under section 23(1) of the Revenue Act of 1938 on assets owned by you is \$37,781.53, whereas the amount claimed is \$61,472.36, and accordingly the amount of \$23,690.83 is disallowed.

(d) The allowable deduction for capital stock tax is \$2,152.00, whereas the amount claimed is \$2,000.00, and accordingly an additional deduction of \$152.00 is allowed.

### COMPUTATION OF INCOME TAX

Taxable net income		\$152,266.30
Adjusted net income		\$152,266.30
Tentative tax at 19%		\$ 28,930.60
Less: 16½% of credit for dividends received	11.22	
2½% of dividends paid credit	3,806.66	3,817.88
	<hr/>	<hr/>
Correct income tax liability		\$ 25,112.72
Income tax assessed:		
Original, account No. 850862		None
		<hr/>
Deficiency of income tax		\$ 25,112.72
		[60]

## [EXHIBIT 2.]

## ASSESSMENT CERTIFICATE

6th District of California Month November 28, 1941  
 Year .....

....., Chief of Division.

....., Bookkeeper.

---

Additional Assessments Income Tax Division.

Lists as to tax and payments compared and found to agree with sectional control ledgers.

---

I Hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names or identification numbers, and that the amounts hereof are as follows:

Date ....., 19.....

.....  
 Collector of Internal Revenue.

---

List	Returns Filed	Excess Collections	Total Tax
		Personal	24,414.12
		Corporation	87,971.9C
Totals reported by collector			
Differences found by commissioner			
Items reported by commissioner			
Total assessment			112,386.02

---



I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due as shown, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, November  
28, 1941

Guy T. Helvering

Commissioner of Internal Revenue. [62]

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## ASSESSMENT LIST.

Page No. ....

District Sixth California, Income Tax, List November  
28, 1941

(Classification.)

	Old Balance	Date	Debit	Credit	New Balance	Remarks
0						
1						
2						
3						
4						
5						
	Consolidated Rock Products Co	2511272			29184 42	1120 274B & D
	2730 S Alameda St.	Int 4071 70				850862 RAR
6						6
	Los Angeles Calif					Int to 11-28-41
	Nov-28-529003 1938					
7						7
8						
9						[63]

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

... ..

### For Calendar Year 1938

or fiscal year beginning \_\_\_\_\_, 1938, and ended \_\_\_\_\_, 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

CONSOLIDATED ROCK PRODUCTS CO.

1/24/2012

2750 south Alameda street.

1998

Los Angeles, Los Angeles, California.

(Past efforts)

(Continued)

Cheng

C

2

M. O.

**Don't miss**

Kind of business: rock and gravel business.

#### ADJUSTED NET INCOME COMPUTATION

Item 5:

## GROSS INCOME

[illegible]

## DEDUCTIONS

[illegible]

## TOTAL INCOME AND EXCESS-PROFITS TAXES

25. *United States v. Galt*, 348 U.S. 217, 15 AFTR2d 57-1111 (S.Ct., 1955).

**AFFIDAVIT.** (See Instruction 6)

[illegible]

15th day of Jan 1938

• **REVIEW**

COMPENAT  
N/A

**AFFIDAVIT.** (See Instruction 6)

I, the undersigned, declare that I have prepared this return for the person named hereon, and that the return (including any accompanying schedules and statements) is a true and correct statement of all the information respecting the income tax and/or cross-profits tax liability of the person for whom this return is being prepared, and I have no knowledge of any fraud or illegality connected with this return.

123

(CONTINUED ON PAGE 10) CONTINUING THE STORY

THE VALUE OF  $\alpha$  AND  $\beta$  FROM 1970 TO 1990

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

**NOTE** - One form marked "DUPLICATE COPY" must be filed with this original return (\$10 will be assessed if duplicate copy is not filed).

1174





EV

UNITED STATES

# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations with total receipts of more than \$250,000 irrespective of amount of net income or deficit; and with net income of more than \$12,000 irrespective of amount of total receipts; and certain classes of corporations specified in instructions 1-(3) irrespective of amount of total receipts or net income.

For Calendar Year 1938

or fiscal year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

CONSOLIDATED ROCK PRODUCTS CO.

(Name)

2730 SOUTH ALAMEDA STREET,

(Street and Number)

LOS ANGELES, LOS ANGELES, CALIFORNIA

(Post office)

(County)

(State)

File Code

Serial No.

District

(Cashier's stamp)

Cash Check M. O.

First Payment

25.112.72  
4071.20  
27784.42  
529003

ROCK, SAND, AND BUILDING MATERIALS

Kind of business

ADJUSTED NET INCOME COMPUTATION

Item No.

GROSS INCOME

1. Gross sales, where it is necessary to show the amount of sales for each month or quarter, and the amount of sales for each year.	Less returns and allowances	3,664,952 05
2. Tax-exempt interest and dividends		2,367,373 43
3. Gross profit from sales of real estate, less cost of sales		1,097,576 62
4. Miscellaneous income, including interest, dividends, and other income		
5. Less: (a) Depreciation on property used in the business, computed under the provisions of the Internal Revenue Code, and (b) depletion on natural resources		29,711 59
6. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		9,758 96
7. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		61 91
8. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		1,492 34
9. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		2,341 97
10. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		80 00
11. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		41,047 43
12. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
13. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
14. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
15. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
16. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
17. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
18. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
19. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
20. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
21. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
22. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
23. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
24. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
25. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
26. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
27. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
28. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
29. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
30. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
31. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
32. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
33. Less: (a) Amortization of intangible assets, and (b) depletion on natural resources		
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1,159,388 00

DEDUCTIONS

Wages - \$119,826.17, Materials - \$100,162.38

Expenses paid for subsidiaries

61,172 76

117,877 17

1,24,921 02

NONE

1,159,388 00

CORPORATION INCOME AND EXCESS-PROFITS TAXES

NONE

NONE

APPROVED FOR THE CORPORATION

MARCH

RECEIVED





## Schedule A.—

## EXCESS PROFITS TAX COMPUTATION

(See Instruction 34)

	Column 1	Column 2 Rate	Column 3 Amount of Tax
7. Balance taxable at - percent (line 5 minus line 6, columns 1); and tax .....	\$ .....	6%	\$ .....
1. Net income for excess-profits tax computation (item 28, page 1).....	\$ NONE		
2. Value of capital stock as declared in your capital stock tax re- turn for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fis- cal year began in 1938 and ended on or after July 31, 1939) .....	\$2,000,000.00		
3. 10 percent of line 2.....	\$ .....		
4. Dividends received credit (85 percent of column 2, Schedule G, but not in excess of 85 percent of item 32, page 1).....	.....		
5. Balance subject to excess-profits tax (line 1 minus total of lines 3 and 4) .....	\$ .....		
6. Amount taxable at 6 percent (5 per- cent of line 2, but not more than line 5); and tax.....	.....	6%	\$ .....
7. Balance taxable at 12 percent (line 5 minus line 6, column 1); and tax .....	\$ .....	12%	.....
8. Total excess-profits tax (total of line 6, column 3, and line 7, col- umn 3) .....	\$ NONE		

## Schedule B.—

## INCOME TAX COMPUTATION.

(See Instructions 35 and 36).

CORPORATIONS WITH NET IN-  
COMES OF NOT MORE THAN  
\$25,000. (See Instruction 36(1))

9. Adjusted net income (item 32, page  
1) .....\$ NONE
10. Dividends received credit (85 per-  
cent of column 2, Schedule G, but  
not in excess of 85 percent of line  
9 above) .....  
\_\_\_\_\_
11. Balance subject to income tax (line  
9 minus line 10) .....\$.....  
\_\_\_\_\_
12. Portion of line 11 (not in excess of  
\$5,000); and tax at 12½ per-  
cent ..... 12½% \$.....
13. Portion of line 11 (in excess of  
\$5,000 and not in excess of \$20,-  
000); and tax at 14 percent..... 14% .....
14. Portion of line 11 (in excess of  
\$20,000); and tax at 16 per cent..... 16% .....  
\_\_\_\_\_
15. Total income tax (total tax in  
column 3 of lines 12, 13, and 14).....\$ NONE



**Schedule C—COST OF GOODS SOLD.** (See Instruction 17)  
(If these amounts are not correct, do necessary corrections.)

**Schedule D—COST OF OPERATIONS.**  
(If these amounts are not correct, do necessary corrections.)

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Inventory at beginning of year	100,514	71
Material or supplies bought for production	1,231,742	03
Manufacturing overhead	548,102	92
<b>Schedule</b>	602,253	75
Cost of goods sold	2,182,613	12
	115,239	98
	2,367,373	43

1. Insurance and other	
2. Other costs	
Total	

**Schedule E—CAPITAL GAINS AND LOSSES.** (See Instruction 21)

SCHEDULE ATTACHED

**Schedule F—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS.** (See Instruction 21)

SCHEDULE ATTACHED

**Supplemental information required for Schedules E and F**

**Schedule G—INCOME FROM DIVIDENDS**

MONOLITH PORTLAND CEMENT COMPANY

80 00

80 00

80 00

**Schedule H—COMPENSATION OF OFFICERS** (See Instruction 23)

Frank Dentler	Vice-President	all	0.10%	0.28%	5,400	00
4730 So. Alameda Street, Los Angeles						
Robert Mitchell	Secretary	all	0.036%	0	4,800	00
4730 So. Alameda Street						
					10,200	00

**Schedule I—INCOME FROM OTHER SOURCES** (See Instruction 25) (See note 1 below)

1,512,430	51	3,500	04	
1,581,058	84	9,044	23	
4,367,936	21	16,887	71	2,084 07
3,356,918	74	19,482	24	1,567 20
3,161,952	05	19,799	99	4,287 67

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County & City property taxes	55,325	72	Federal Capital stock tax	2,000	00
State & Federal payroll taxes	33,736	36	City licenses	237	02
Truck registration & license fees	11,590	08	Miscellaneous licenses	125	00
State Franchise taxes	3,825	00	Street lighting maintenance	52	43
Truck hauling tax	2,966	04			
				109,861	65

Schedule K - CONTRIBUTIONS OR GIFTS PAID (See Instruction 21)

NONE

Schedule L - DEPRECIATION (See Instruction 30)

SCHEDULE ATTACHED

Schedule M - OTHER DEPLETIONS (See Instruction 32)

SCHEDULE ATTACHED

Schedule N - DISTRIBUTIONS TO STOCKHOLDERS AND DIVIDENDS PAID CREDIT

NO DIVIDENDS PAID DURING 1936





Assets	Beginning of Fiscal Year		End of Fiscal Year	
	Amount	Total	Amount	Total
Cash	\$ 334,184 03	\$ 235,175 64	\$ 338,594 27	\$ 366,332 64
Notes and accounts receivable	78,583 31	261,600 72	60,427 24	278,166 73
Less reserve for bad debts				
Inventories				
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
Investment in subsidiaries	100,511 71	100,511 71	115,239 98	115,239 98
(a) Shareholding in State, Territory or posited subdivision		3,882,388 60		3,711,503 89
(b) Shareholding in the District of Columbia or United States				
(c) Obligations of the United States				
(d) Obligations of instrumentalities of the United States				
Other investments				
Stocks	4,523 43		4,411 93	
Bonds	166,000 00	170,523 43	166,000 00	170,411 93
Capital assets				
(a) Land, buildings, fixtures, Machinery & Equip.	181,090 31		219,929 64	
Furniture and fixtures	12,858 36		13,820 76	
Delivery equipment	243,354 62		291,126 32	
Transportation assets	437,303 29		521,876 72	
Less reserve for depreciation	236,704 63	200,598 66	282,945 75	211,930 97
Depreciation assets				
Less reserve for depreciation		68,026 46		68,026 46
Prepaid items	55,675 15		51,903 30	
Reorganization expense	135,037 92		107,966 36	
	20,409 75	211,122 82	22,808 48	182,678 14
		4,929,949 24		5,134,690 58
LIABILITIES				
		119,494 90		123,880 50
	68,733 16			
		68,733 16		
Interest & taxes	39,933 07		46,837 57	
All other	30,068 61	70,001 68	29,541 54	76,379 11
Accounts with subsidiaries	5,194,129 93	5,194,129 93	5,437,094 93	5,437,094 93
Reserve for contingencies	36,985 24	36,985 24	35,235 24	35,235 24
	1,800,000 00		1,800,000 00	
	1 00	1,800,001 00	1 00	1,800,001 00
		2,559,446 67		2,537,900 28
		4,929,949 24		5,134,690 58

# RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Income statement and ending profits as shown in Exhibit "A" at close of preceding tax year.	2,359,396 67
2. Adjustments and corrections from 32 part 1	15,532 14
3. Subtotal	
4. Income tax	
(a) State, Territory or Possession	
(b) District of Columbia	
(c) United States	
(d) Federal Income Tax	
(e) Federal Income Tax	
(f) Federal Income Tax	
(g) Federal Income Tax	
(h) Federal Income Tax	
(i) Federal Income Tax	
(j) Federal Income Tax	
(k) Federal Income Tax	
(l) Federal Income Tax	
(m) Federal Income Tax	
(n) Federal Income Tax	
(o) Federal Income Tax	
(p) Federal Income Tax	
(q) Federal Income Tax	
(r) Federal Income Tax	
(s) Federal Income Tax	
(t) Federal Income Tax	
(u) Federal Income Tax	
(v) Federal Income Tax	
(w) Federal Income Tax	
(x) Federal Income Tax	
(y) Federal Income Tax	
(z) Federal Income Tax	
5. Profits of subsidiary	8,173 79
6. Increase of loss on sale of assets	7,644 88
7. Additional depreciation	117,818 86
8. Amount of leaseholds	6,663 44

9. Subtotal credits to earned surplus, netted

(a)

(b)

(c)

10. Total Credits

11. Total Credits

2,359,396 67

125

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QUESTIONS

Page 6

1. Date of incorporation January, 1929
2. State or country Delaware
3. State collector's office where your return for the preceding year was filed Los Angeles

The corporation's books are in care of CONSOLIDATED ROCK PRODUCTS CO. Located at 2730 So. Alameda St., Los Angeles

5. Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? No If so, an additional return on Form 1120H must be filed.
6. Is this a consolidated return of railroad corporations? No If so, procure from the collector of internal revenue for your district Form 851. Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
7. If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation, either domestic or foreign, or (b) did any corporation, individual, partnership, trust, or association, own at any time during the taxable year 50 percent or more of your voting stock? Yes If the answer is "yes" attach separate schedule showing with respect to each: (1) Name and address, (2) percentage of stock owned, (3)

date stock was acquired, and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.

8. Was the income of this corporation included in a consolidated return for any prior year? No If so, give name and address of corporation which filed the consolidated return and the last year for which such return was filed.....

.....

9. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes," give name and address of each predecessor business, and the date of the change in entity.....

.....

Upon such change, were any asset values increased or decreased? ..... If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.



10. Is this return made on the basis of cash receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income Accrual

.....  
.....  
.....  
.....

11. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower Cost or market, which ever lower If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock.....

.....  
.....  
.....  
.....  
.....

12. Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 9-(1) (for the calendar year 1938? Yes

.....

13. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No If answer is "yes," attach schedule as required by Instruction 13-(2).

## BUSINESS CLASSIFICATION

If the corporation is engaged in business falling in only one of the following classes, place a check mark on the broken line in front of that class. If the corporation is engaged in business falling in more than one of the following classes, indicate on the broken lines in front of the two classes responsible for the greater part of total receipts, the approximate percentage of total receipts from all sources accounted for by each of these two classes. (See Instruction 16.)

xNonmetallic mining and quarrying:

Other mining and quarrying.\*

xStone, clay, and glass products:

Concrete, gypsum, wallboard, and plaster products, including all types of wallboard.

Merchant wholesalers:

xAll other merchant wholesalers.\*

\*Specify wholesaler of building material. B-6 [81]

[EXHIBIT 6.]

T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T

INTERNAL REVENUE SERVICE

Los Angeles, Calif.

March 9, 1939

Office of the Collector  
Sixth District of California

In replying refer to - IT:LAL

Consolidated Rock Products Co.,  
2730 South Alameda Street,  
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)

Collector.

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## CONSOLIDATED ROCK PRODUCTS CO.

(A Delaware Corporation)

Schedule "C"—Items 3 and H—Cost of Goods Sold

Salaries and Wages—Other Costs

For the Calendar Year 1938

	Production Cost	Delivery Cost	Total Cost
Salaries and wages	\$285,299.95	\$262,802.97	\$ 548,102.92
Fuel, power and light	\$ 81,086.83	\$ 2,793.65	\$ 83,880.48
Water	16,245.25	732.32	16,977.57
Truck rental	39,619.33	95.07	39,714.40
Gasoline and oil		95,442.32	95,442.32
Insurance — com- pensation	18,034.64	7,029.77	25,064.41
Insurance — other	8,380.08	11,854.06	20,234.14
Tires		40,442.08	40,442.08
Interplant trans- portation	160,125.05		160,125.05
Outside truck hire		80,070.02	80,070.02
Miscellaneous supplies	8,707.94		8,707.94

CONSOLIDATED ROCK PRODUCTS CO.

(A Delaware Corporation)

Item 11A (Schedule E) - Capital Gains and Losses during the calendar year ended December 31, 1938

Description of Property	Date Acquired	Date Sold	Gross Sales Price	Cost	Accrued Depreciation At Date Of Sale	Net Book Value at Date of Sale	Expenses of Sale	Net Profit Or Loss	Net Profit or Loss on Appraised Value Basis as Per Books
Rock Crusher	1924	March, 1938	\$ 300.00*					\$ 300.00	\$ 300.00
Barbour Green Loader	1923	August, 1938	700.00*				\$ 16.00	684.00	684.00
Universal Crusher	1925?	Sept., 1938	250.00*					250.00	250.00
Water motor	July, 1935	Sept., 1938	100.00	\$ 390.36	\$ 247.23	\$ 143.13		43.13	43.13
Check writer	April, 1929	August, 1938	4.00	77.50	73.52	3.98		.02	- 11.50
Rails (Salvaged)	Prior to 1930	November, 1938	300.00*					300.00	300.00
Two adding machines	Prior to 1930	November, 1938	35.00*					35.00	35.00
Truck No. 58	January, 1927	May, 1938	-	\$ 4,576.41	\$ 4,576.41			-	100.00
Mixer No. 3 (wrecked)	May, 1936	September, 1938	950.00 (a)	2,045.82	1,076.38	969.44	14.11	33.55	33.55
			<u>\$2,639.00</u>	<u>\$ 7,090.09</u>	<u>\$5,973.54</u>	<u>\$ 1,116.55</u>	<u>\$ 30.11</u>	<u>\$ 1,492.34</u>	<u>\$ 1,380.02</u>
Net gain on appraised value basis (per books)								<u>1,380.02</u>	
Difference to schedule "F" Reconciliation of Net Income								<u>\$ 111.52</u>	

\* Cost cannot be identified in accounts. Property was 100% depreciated.

(a) Insurance recovery, \$850.00 and salvaged motor, \$100.00.

Item 11b (Schedule F) - Gain or Loss from sale or exchange of property during the calendar year ended December 31, 1938

Condemnation Bandini property	November, 1927	February, 1938	\$ 500.00	\$ 810.48	-	\$ 910.48	\$562.50	\$ 872.98	\$ 736.87
Florence Avenue Lot	March, 1928	June, 1938	2,500.00	11,751.35	-	11,751.35	48.82	9,293.57	4,542.22
Condemnation - Hauser Blvd.	February, 1927	September, 1938	2,518.00	12,693.42	-	12,693.42	-	10,175.42	7,418.00
			<u>\$5,518.00</u>	<u>\$25,255.25</u>	<u>-</u>	<u>\$25,255.25</u>	<u>\$604.72</u>	<u>\$20,341.97</u>	<u>\$12,697.09</u>
Net Loss on appraised value basis (per books)								<u>12,697.09</u>	
Difference to schedule "F" - Reconciliation of Net Income								<u>\$ 7,644.08</u>	

13.8

CONSOLIDATED ROCK PRODUCTS CO.

(A Delaware Corporation)

Item 13 – Other Income for the Calendar Year 1938

Sale of Scrap	\$ 2,263.41
Purchase discounts	2,981.71
Recovery of accounts receivable previously written off as uncol- lectible	1,104.52
Fees from weighing	1,319.50
Fees from dumping	172.55
Service fees-subsiary company	1,100.00
Commissions earned	1,167.63
Sale of gold	2,698.33
Unclassified	1,625.97
Profit on sale of gas and oil	950.61
Reduction of prior years' provisions for losses on accounts receivable	22,538.42
Dividend on compensation insurance for year 4-1-36 to 41-1-37	3,124.78
Total – Item 13	<hr/> \$41,047.43 <hr/> <hr/>

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Expenses of subsidiaries during the calendar year 1938

Subsidiary Capital	Totals	Rent on Business Property	Interest On Bonds	Depreciation	Depletion	Amortisation of Leaseholds	Interest on Notes and Mortgages	Amortization of Bond Discount and Expense
Atlas Mixed Mortar Co.	\$ 140.67	\$ 85.00		\$ 55.67				
Builders Crushed Rock Products Co.	6,390.31	936.11		4,204.70		\$1,250.00		
Consumers Rock and Gravel Company, Inc.	222,249.98	39,398.12	\$ 72,030.00	\$ 99,524.81	\$ 7,090.12			\$ 4,206.93
Orange County Rock Corporation	4,900.00	4,900.00						
Reliance Rock Company	13,810.52			13,810.52				
Sunset Rock Products Company, Inc.	19,974.23	321.80		19,652.43				
Union Rock Company	213,133.06	15,356.28	119,340.00	60,913.67	1,295.89	5,413.44	\$ 716.68	\$10,097.10
Union Rock Land Company	3,615.13			2,698.23	8.16		908.74	
Total (Item 22 on Tax Return)	448,214.40	\$60,997.31	\$191,370.00	\$200,860.03	\$8,394.17	\$6,663.44	\$1,685.42	\$14,384.03

B-10



Item 21 (Schedule 1) Computation of Depreciation Claimed for the Year 1938

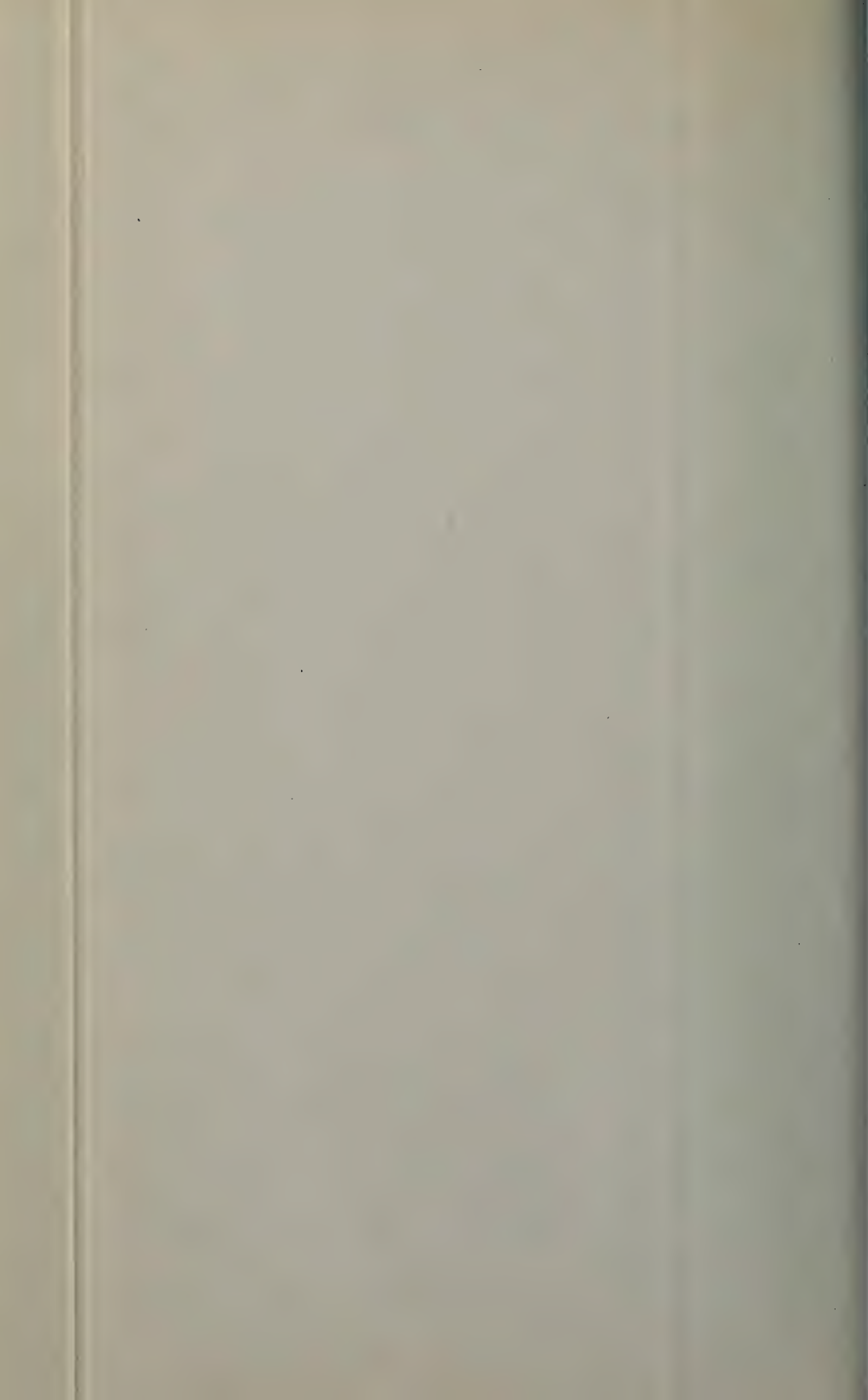
Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirements, Year 1938	Balance Of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Value (book) of Property at 12-31-38	Total Reserve at 12-31-38
<b>Rock and Gravel Plants:</b>												
Sierra	\$177,064.19		\$177,064.19	\$177,838.87	\$177,838.87	\$59,225.32		3	21,306.33	\$155,757.86		
additions - 1936	9,317.18		9,317.18	1,727.35	1,727.35	7,589.83		6	1,164.65	6,425.18		
- 1937	16,196.89		16,196.89	812.40		15,384.49		7	2,084.61	13,359.88		
12-31-38						713.24		8	-	713.24		
	\$202,578.26		\$202,578.26	\$120,378.62	\$120,378.62	\$82,912.88			\$17,995.59	\$64,917.29	\$202,578.26	\$120,378.62
<b>Concrete Materials</b>	\$100,807.21		\$100,807.21	\$100,807.21		\$100,807.21		0			\$100,807.21	\$100,807.21
<b>TOTAL - ALL PLANTS</b>	\$303,385.47		\$303,385.47	\$221,185.83		\$221,185.83			\$17,995.59	\$64,917.29	\$303,385.47	\$221,185.83
<b>Santa Barbara Yard and Equipment</b>	\$38,558.29		\$38,558.29	\$37,715.05		\$37,715.05	\$843.24	5	\$168.65	\$37,546.40		
additions - 1936	3,570.25		3,570.25	966.93		966.93	2,603.32	3	392.56	1,710.76		
- 1937	,835.81		,835.81	23.22		23.22	812.59	11	66.65	746.24		
4-30-38							750.00	15	3.33	746.67		
12-30-38							971.28	2	130.03	841.25		
	\$42,964.35		\$42,964.35	\$38,705.20		\$38,705.20	\$5,980.43		\$1,291.22	\$41,614.03	\$42,964.35	\$38,705.20
<b>Automotive Equipment: Trucks and Trailers</b>	\$203,679.63		\$203,679.63	\$203,409.63		\$203,409.63	\$270.00	Various	\$270.00	-0-		
additions - 1936	72,701.20	\$300.00	72,401.20	13,313.01		13,313.01	59,088.19	Various	13,334.00	\$45,744.19		
- 1937	2,051.73		2,051.73	131.06		131.06	1,920.67	3	514.93	1,405.74		
- 1937	5,613.02		5,613.02	704.25		704.25	4,908.77	1 plus	2,806.51	2,102.26		
- 1938							1,000.00	1	1,000.00	0.00		
- 1938							866.30	3	288.76	577.54		
- 1938							9,819.71	5	396.71	9,423.00		
- 1938							1,695.89	3 plus	423.96	982.23		
	\$284,045.58	\$300.00	\$283,745.58	\$217,557.95	\$289.70	\$217,847.65	\$89,481.35		\$13,702.47	\$69,439.63	\$283,745.58	\$217,557.95
<b>Concrete Mixers</b>	\$37,512.74		\$37,512.74	\$33,406.99		\$33,406.99	\$4,105.75	1	\$4,105.75			
additions - 1934	2,804.86		2,804.86	1,636.15		1,636.15	1,168.71	2 Plus	467.47	701.24		
- 1936	12,960.46	\$1,485.43	11,475.03	4,244.32	\$866.51	3,377.81	8,097.22	2 Plus	3,147.28	4,948.54		
- 1937	2,100.50	560.39	1,540.11	85.85	210.15	1,244.30	1,664.41	1 Plus	990.20	664.21		
- 1938							1,030.44	2 Plus	35.87	994.57		
	\$55,378.56	\$2,045.82	\$53,332.74	\$39,373.21	\$1,086.69	\$41,860.00	\$46,039.53	4	\$5,194.78	\$21,811.37	\$53,332.74	\$39,373.21
<b>Pipes, Tubes &amp; Motors</b>	\$40,799.80		\$40,799.80	-	-	-	\$40,799.80		\$13,981.33	\$26,818.47	\$40,799.80	\$26,818.47
1938 Change							4,461.91					
	\$40,799.80		\$40,799.80				\$36,337.89			\$4,461.91	\$40,799.80	\$36,337.89
<b>Attachable truck equipment</b>	\$1,007.68		\$1,007.68	\$302.74		\$302.74	\$704.94	3	\$201.54	\$506.40		
additions							584.77	5	21.23	563.54		
	\$1,007.68		\$1,007.68	\$302.74		\$302.74	\$1,289.71		\$222.77	\$1,066.94	\$1,007.68	\$302.74
<b>Improvements &amp; Additions to Leased Equip. 12-31-38</b>							\$1,721.99	2	-0-	\$1,721.99		
<b>TOTAL FIVE EQUIPMENT</b>	\$381,231.62	\$2,345.82	\$378,885.80	\$257,234.00	\$2,176.39	\$259,410.39	\$174,767.97		\$31,902.57	\$137,765.40	\$378,885.80	\$257,234.00





Item 21. (Schedule L) Computation of Depreciation Claimed for the year 1938

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CONSOLIDATED ROCK PRODUCTS CO.  
(A Delaware Corporation)

Item 24 (Schedule L) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance Of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Office Furniture & Equipment	\$ 18,260.02	\$ 77.50	\$ 18,182.52	\$ 14,569.32	\$ 73.52	\$ 14,495.80	\$ 3,686.72	Various	\$ 1,823.43	\$ 1,863.29		
Additions - 1937	144.20		144.20	14.42		14.42	129.78	4 Plus	28.84	100.94		
- 1937	257.51		257.51	22.36		22.36	235.15	9 Plus	25.75	209.40		
- 1938							623.58	10	18.30	605.28		
- 1938							400.82	5	13.11	387.71		
	\$ 18,661.73	\$ 77.50	\$ 18,584.23	\$ 14,606.10	\$ 73.52	\$ 14,532.58	\$ 5,076.05		\$ 1,909.43	\$ 3,166.62	\$ 19,608.63	\$ 16,442.01
TOTAL ALL PROPERTY	\$ 779,946.06	\$ 3,407.26	\$ 776,538.80	\$ 548,533.50	\$ 1,855.64	\$ 550,389.14	\$ 308,080.66		\$ 61,472.36	\$ 243,355.25	\$ 855,216.75	\$ 611,861.50

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess or deficiency of Credits to depreciation reserve as per books over or under depreciation claimed as per schedules attached to tax returns:

Years 1934, 1935, 1936 and 1937 per returns for those years		\$ 19,369.05	\$ 19,369.05
Year 1938 - per books	\$ 58,740.96		
Year 1938 - per schedule above	61,472.36	2,731.40	2,731.40
Add - Value of real estate deducted from cost of concrete materials plant		5,841.12	\$ 5,841.12
- Construction work in progress		15,828.42	15,828.42
Other adjustments, as detailed on schedule attached to 1936 return - net		696.37	696.37
Difference in charges to reserve account sales and retirements of property:			
Per books - appraised value basis	\$ 10,295.67		
- cost basis	14,600.23	4,304.56	4,304.56
		\$ 244,778.95	\$ 876,886.29
Deduct: Difference between appraised values of property (as carried on the general ledger) and cost of property, and depreciation reserve as computed upon appraised and cost values		2,847.98	352,009.57
		\$ 241,930.97	\$ 524,876.72
Totals as per balance sheet as at December 31, 1938			\$ 282,945.75

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CONSOLIDATED ROCK PRODUCTS CO.

(A Delaware Corporation)

Item 26 (Schedule M) – Other Deductions authorized by  
Law For the Calendar Year 1938

Compensation insurance	\$ 550.63
Power and light	538.74
Fuel, oil and gas	8,054.64
Water	72.00
Telephone	8,726.11
Auto and travel expense	7,211.07
Stationery and postage	12,020.67
Legal and audit	4,928.21
Corporation and fiscal	2,966.91
General expenses	24,375.89
Subscriptions and association dues	13,902.88
Insurance	5,469.44
Rock association expenses	3,117.71
Repair of flood damage	23,118.52
Truck motors and transmissions junked and charged out of inventory	2,823.75

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Item 26 – Total	\$117,877.17
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## CONSOLIDATED ROCK PRODUCTS CO.

(A Delaware Corporation)

Stock Owned in Controlled Companies as at December 31,  
1938

<u>Company</u>	<u>Address</u>	<u>Percent of Stock Owned</u>	<u>Date Stock Acquired</u>	<u>Tax Return Filed at</u>
Union Rock Company	Los Angeles, Calif.	100.00	1929	Los Angeles
Sunset Rock Products Co., Inc.	Los Angeles, Calif.	60.00	1930	Los Angeles
Sunset Rock Products Co.	Los Angeles, Calif.	60.00	1930	Los Angeles
Consumers Rock & Gravel Co.	Los Angeles, California	100.00	1929	Los Angeles
Consumers Rock & Gravel Company, Inc.	Los Angeles, Calif.	7.30	1929	Los Angeles
Atlas Mixed Mortar Company	Los Angeles, Calif.	49.00	1930	Los Angeles
Southwest Land & Water Company	Los Angeles, Calif.	100.00	1930	Los Angeles

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[EXHIBIT 8]

OPERATING AGREEMENT

Agreement, made and entered into in duplicate original this 15th day of July, 1929, by and between Consolidated Rock Products Co., a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Operating Company", and Builders Crushed Rock Products Company, a corporation duly organized and existing under the laws of the State of California, hereinafter called "Owning Company"; both of the parties hereto being duly authorized to do and doing business in the State of California,

This Indenture, Witnesseth:

Recitals

The Operating Company and the Owning Company have each been engaged in the production, transportation and sale of rock and rock products, maintaining therefor separate operating organizations. The Owning Company, by reason of stock ownership, is a subsidiary of the Operating Company. Under the circumstances, the maintenance by each of separate and distinct operating organizations is not consistent with efficient and economical management; and results in duplicated production, transportation and sales expense, with attendant increased costs to the purchasing public of rock and rock products. Therefore, in the public interest as well as in the interests of the parties hereto, it is proposed that the Operating Company maintain and operate the properties of the Owning Company as hereinafter more particularly referred to under one operating organization. The economies thereof will result in material savings to the purchasing public of

rock and rock products, will permit of reasonable returns from operation of the business, and will result in the maintenance [93] of competition with other rock companies operating in this territory, upon a fair and wholesome basis.

An agreement between the parties hereto has been reached as hereafter stated.

### Agreement

Now, Therefore, It Is Mutually Understood and Agreed By and Between the Parties Hereto as Follows:

#### Section 1. Effective date.

The effective date of this agreement shall be the 1st day of July, 1929, and this agreement shall be deemed as having been entered into on and as of said date.

#### Section 2. Properties of the Owing Company subject hereto.

Properties of the Owing Company subjected to the provisions of this agreement shall be (except as herein expressly excepted and excluded), all of the property real and personal and wheresoever situate. It is understood that all cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company. Notwithstanding anything to the contrary herein, any contracts for the purchase of materials or supplies are expressly excepted and excluded herefrom unless the Operating Company shall elect to accept the same by written notice unto the

Owning Company and the other party or parties to any such transaction. The term "properties" as hereafter used shall be deemed to [94] mean and include the properties of the Owning Company as next hereinabove referred to.

### Section 3. Ownership.

It is understood and agreed, notwithstanding anything to the contrary herein contained, that the ownership of said properties (other than cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, which are subject to transfer and assignment as herein provided) shall be and remain in the Owning Company; and that the Operating Company shall have no estate therein nor no rights therein or thereto except as herein provided.

### Section 4. Operation of properties by Operating Company.

(a) For the purpose of maintenance and operation thereof, and the production, transportation and sale of rock and rock products therefrom, (1) the Owning Company hereby vests in the Operating Company for the term hereof the possession and custody of its properties above referred to the Ownership of which is retained by the Owning Company, and (2) the Owning Company hereby assigns and transfers unto the Operating Company all of its cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, and agrees to furnish such other and further documents as the Operating Company may require to

effectuate such assignment and transfer. The Operating Company hereby accepts said assignment and transfer and the possession and custody of the properties above referred to for the purposes [95] herein stated; it being mutually understood, however, that the same shall be subject to the further terms and conditions hereafter set forth in this agreement.

(b) The Operating Company hereby agrees to furnish a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owing Company, and to operate such properties for the term hereof; provided, however, that the Operating Company may at its option (conditional however upon the preservation in the Owing Company of its present leasehold rights) discontinue for such time as the Operating Company may deem desirable the actual physical operation of any part or parts of said properties if the same is not consistent with the efficient and economical management of all of said properties considered as a whole.

(c) The Owing Company hereby grants unto the Operating Company the right to use its properties for advertising purposes, including uniform painting of motor trucks and other vehicles.

(d) The Operating Company shall furnish at its own expense all materials and supplies, and all labor and superintendence, for the maintenance and operation of the properties of the Owing Company.



## Section 5. Maintenance and upkeep.

The Operating Company shall maintain and keep in first-class operating condition all buildings, structures and equipment of every sort and nature of the Owning Company subject to the provisions of this agreement; provided, however, that upon the termination of this agreement howsoever the Operating Company shall not be liable unto the Owning Company to do more than to return to it its properties in substantially the same condition as when received by the Operating [96] Company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to. The Operating Company shall be at liberty to make such additions to, betterments of, and improvements in said properties during the term hereof as in its judgment may seem desirable in connection with efficient operation of the business, and to carry out such retirements and/or replacements as in its judgment are necessary to accomplish the same purpose, the costs of which additions, betterments, improvements and replacements shall be paid by the Operating Company and charged to the current account of the Owning Company.

## Section 6. Accounting Methods.

The Operating Company agrees to keep and maintain books and accounts for the Owning Company in accordance with modern and approved accounting methods, recording therein proper entries affecting depreciation, depletion, amortization and obsolescence of each of said properties as well as entries recording the transactions

between the parties hereto, and other matters properly and customarily stated in books of account in recording transactions and evidencing the results thereof. The accounting methods to be used by the Operating Company pursuant to the provisions of this section shall be subject to the approval of Haskins & Sells, or other duly certified public accountants satisfactory to the Operating Company and the Owning Company.

#### Section 7. Claims and suits.

The Operating Company hereby undertakes and agrees (1) to indemnify the Owning Company against and hold it harmless from all [97] claims, demands, actions, causes of action, judgments and awards of every sort and nature by reason of injury to or death of persons or loss of or damage to property caused by or arising from, either directly or indirectly, the operations of the Operating Company hereunder; and (2) upon behalf of the Owning Company to defend and/or settle and pay any claims or suits against the Owning Company existing and of which the Operating Company had knowledge on the effective date of this agreement, but expressly excepting and excluding any claims or suits against said Owning Company not a matter of record upon the books of the Owning Company upon said date and unknown to the Operating Company, and further expressly excepting and excluding any claims or suits based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All amounts, including costs and expenses, incident to matters covered by this subdivision (2) of this section paid by the Operating Company shall be deemed paid by

it as agent and upon behalf of the Owning Company, and such payments shall thereupon be taken into the account of the parties and shall reflect themselves in the current accounts of said parties.

#### Section 8. Assumption by the Operating Company of Liabilities.

The Operating Company hereby assumes and agrees to pay on behalf of the Owning Company all notes, bills and accounts payable appearing upon the books or records of the Owning Company on the effective date of this agreement and any other bills payable not so appearing but of which the Operating Company had notice on or prior to said date; provided, however, that the Operating Company shall be [98] privileged to defend the same or any thereof if illegal, unjust or otherwise inequitable or unfair, and provided further that the Operating Company does not assume or agree to pay any notes, bills or accounts payable based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All payments made by the Operating Company pursuant to the provisions of this section shall be deemed paid by it as agent and upon behalf of the Owning Company, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

#### Section 9. Operating Expenses and Revenues.

The Operating Company hereby undertakes and agrees to bear and pay the following operating expenses, namely: (a) all maintenance and operating expense of the properties herein referred to during the term hereof, includ-



ing that of its own operating organization which shall act solely and exclusively in the premises, (b) all expense incident to the maintenance of the corporate existence of the parties hereto, (c) all taxes, state and Federal (for the purposes hereof deemed operating expense), with the understanding that the Operating Company shall be privileged under the provisions of the law of the United States as it now is or hereafter may be to file consolidated income tax returns and to pay the same upon behalf of the parties to this agreement, and (d) all other operating charges and expenses of the Owning Company of every sort and nature, including items of depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the Owning Company and shall be paid to said Owning Company [99] as and when provided in Section 13 hereof, and in consideration thereof the Operating Company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties.

#### Section 10. Compensation.

Since the Operating Company herein covenants and agrees to furnish the Owning Company with a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owning Company, thus relieving the Owning Company of the burden of maintaining a separate and distinct operating organization, and since under the provisions hereof the Operating Company covenants and agrees to pay all maintenance and operating expenses of the Owning Company and to protect it against any operating deficit, it is distinctly



understood and agreed that the covenants of the Operating Company herein contained shall be and they are full and adequate consideration for the covenants of the Owning Company herein set forth.

#### Section 11. Option to Purchase.

The Owning Company hereby grants unto the Operating Company throughout the term hereof the option to purchase its properties the ownership of which is retained pursuant to the provisions of Section 3 hereof, in consideration of payment of a sum of money equivalent to the appraised value of said properties as determined by a board of three appraisers, one to be appointed by the Operating Company, one by the Owning Company, and the third by the two appraisers so appointed.

Should the Operating Company consider the advisability of the purchase of the properties of the Owning Company it may require the appraisement above referred to by written demand therefor, naming its ap- [100] praiser. Within thirty (30) days after receipt of such demand the Owning Company shall name its appraiser and notify the Operating Company in writing thereof, but if within said period the Owning Company shall not have chosen its appraiser and notified the Operating Company in writing thereof, the Operating Company shall have the right to name the Owning Company's appraiser, the Owning Company to be notified in writing thereof. The two so appointed shall appoint the third appraiser. Should the board of three appraisers be unable to agree as to the value of said properties, they shall call in two additional appraisers and the decision of the majority of said board of five shall be deemed the value of said properties. The

Operating Company shall have thirty (30) days after receipt of the written return of said appraisers within which to elect to exercise said option. Exercise of said option shall be by notice in writing. All costs of appraisal shall be borne and paid by the Operating Company.

#### Section 12. Term.

Unless earlier terminated by mutual consent of the parties hereto, this agreement shall remain in effect until terminated by thirty (30) days written notice by either party hereto unto the other.

#### Section 13. Final Accounting.

Upon termination of this agreement, the possession and custody of the properties of Owning Company the ownership of which is retained pursuant to the provisions of Section 3 hereof shall be re-vested by the Operating Company in said Owning Company, and in that event a financial adjustment shall be made as between the Operating Company and the Owning Company, in accordance with the current account [101] of the parties on date of return of said properties; and payment shall thereupon be made in accordance therewith.

#### Section 14. Successors and Assigns.

This agreement shall be binding upon the respective successors and assigns of the parties hereto; provided, however, that the Operating Company shall not assign this agreement or any right or privilege herein conferred without the written consent of the Owning Company.

Section 15. Benefits of this Agreement.

It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof.

In Witness Whereof, the parties hereto have caused this agreement to be executed upon their behalf by their respective officers thereunto duly authorized, and their respective corporate seals hereunto affixed, as of the date herein first written.

CONSOLIDATED ROCK PRODUCTS CO.

By B. F. Nyswander, Jr. (signed)  
Its Vice-President

Attest:

John D. Gregg (signed)  
Secretary

BUILDERS CRUSHED ROCK PRODUCTS  
COMPANY

By S. W. BURFORD (signed)  
Its President

Attest:

Robt. Mitchell (signed)  
Secretary [102]

## [EXHIBIT 9]

## OPERATING AGREEMENT

Agreement, made and entered into in quadruplicate original this 15th day of July, 1929, by and between Consolidated Rock Products Co., a corporation duly organized and existing under the laws of the State of Delaware, party of the one part, hereinafter called "Operating Company", and Union Rock Company, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Union Company", Consumers Rock & Gravel Company, Inc., a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Consumers Company", and Reliance Rock Company, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Reliance Company", parties of the other part, for convenience referred to hereinafter collectively as "Owning Companies"; all of the parties hereto being duly authorized to do and doing business in the State of California.

This Indenture, Witnesseth:

## Recitals

The Union Company is the owner of all of the outstanding capital stock of the Reliance Company, with the exception of qualifying shares of directors; and the Operating Company is the owner of all outstanding capital stock of the Union Company and the Consumers Company, with the exception of qualifying shares of directors.

The Union Company entered into a certain Trust Indenture dated the 1st day of September, 1927, with Title Insurance and Trust Company, a corporation duly or-



ganized and existing under the laws of the State of California, as Trustee, to secure a bond issue in a total authorized principal amount of Five Million Dollars (\$5,000,000.00) [103] par value, of which issue bonds in the principal amount of Two Million, Four Hundred Twenty Three Thousand Dollars (\$2,423,000.00) par value are outstanding; and the Consumers Company entered into a certain Trust Indenture dated the 1st day of July, 1928, with Bank of Italy National Trust & Savings Association, a banking association organized and existing under and by virtue of the laws of the United States of America, as Trustee, to secure a bond issue in a total authorized principal amount of Two Million, Five Hundred Thousand Dollars (\$2,500,000.00) par value, of which issue bonds in the principal amount of One Million, Five Hundred Thousand Dollars (\$1,500,000.00) par value are outstanding. Each of said Trust Indentures are duly recorded and registered as required by law and reference to them is hereby made for detailed provisions thereof.

Under the circumstances, the maintenance by each of the Owning Companies of separate and distinct operating organizations is not consistent with efficient and economical management; and results in duplicated production, transportation and sales expense, with attendant increased costs to the purchasing public of rock and rock products. Therefore, in the public interest as well as in the interests of the parties hereto, it is proposed that the Operating Company, subject to the provisions of the Trust Indentures above referred to, maintain and operate the properties of the Owning Companies as hereinafter more particularly referred to under one operating organization. The economies thereof will result in material sav-

ings to the purchasing public of rock and rock products, will permit of reasonable returns from operation of the business, and will result in the maintenance of competition with other rock com- [104] panies operating in this territory, upon a fair and wholesome basis.

An agreement between the parties hereto has been reached as hereafter stated.

### Agreement

Now, Therefore, It Is Mutually Understood and Agreed by and Between the Parties Hereto as follows:

#### Section 1. Effective date.

The effective date of this agreement shall be the 1st day of April, 1929, and this agreement shall be deemed as having been entered into on and as of said date.

#### Section 2. Properties of the respective Owning Companies subject hereto.

(a) Properties of the Union Company subjected to the provisions of this agreement shall be:

(1) Those particularly described or referred to in and subjected to the provisions of said Trust Indenture dated the 1st day of September, 1927, (paragraphs I to IX, inclusive, pages 11 to 70, inclusive, of printed copy of said Trust Indenture), including also

(2) Cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials (all of which referred to in this subdivision

(2) of paragraph (a) of Section 2 shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company), but expressly excepting [105] and excluding any contracts for the purchase of materials or supplies unless the Operating Company shall elect to accept the same by written notice unto the Union Company and the other party or parties to any such transaction.

(b) Properties of the Consumers Company subjected to the provisions of this agreement shall be:

(1) Those particularly described or referred to in and subjected to the provisions of said Trust Indenture dated the 1st day of July, 1928, (pages 7 to 23, inclusive, of printed copy of said Trust Indenture), including also

(2) Cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials (all of which referred to in this subdivision (2) of paragraph (b) of Section 2 shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company), but expressly excepting and excluding any contracts for the purchase of materials or supplies unless the Operating Company shall elect to accept the same by written notice unto the Consumers Company and the other party or parties to any such transaction.

(c) Properties of the Reliance Company subjected to the provisions of this agreement shall be (except as in



this paragraph (c) expressly excepted and excluded) all of its property real and personal and wheresoever situate. It is understood that all cash, securities, notes and bills and accounts receivable, book accounts, [106] manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company. Notwithstanding anything to the contrary herein, any contracts for the purchase of materials or supplies are expressly excepted and excluded herefrom unless the Operating Company shall elect to accept the same by written notice unto the Reliance Company and the other party or parties to any such transaction.

The term "properties" as hereafter used shall be deemed to mean and include the properties of the respective Owning Companies as next hereinabove referred to.

### Section 3. Ownership.

It is understood and agreed, notwithstanding anything to the contrary herein contained, that the ownership of said properties (other than cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, which are subject to transfer and assignment as herein provided) shall be and remain in the Owning Companies respectively, subject, however, to the provisions of the Trust Indentures above referred to; and that the Operating Company shall have no estate therein nor no rights therein or thereto except as herein provided. It is further understood and agreed that the provisions here-



of are and at all times shall be subordinate and subject to the provisions of said Trust Indentures. [107]

Section 4. Operation of Properties by Operating Company.

(a) For the purpose of maintenance and operation thereof, and the production, transportation and sale of rock and rock products therefrom, (1) the Owning Companies, subject to the provisions of the Trust Indentures above referred to, hereby vest in the Operating Company for the term hereof the possession and custody of their properties above referred to the ownership of which is retained by the Owning Companies, and (2) the Owning Companies hereby assign and transfer unto the Operating Company all of their cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, and agree to furnish such other and further documents as the Operating Company may require to effectuate such assignment and transfer. The Operating Company hereby accepts said assignment and transfer and the possession and custody of the properties above referred to for the purposes herein stated; it being mutually understood, however, that the same shall be subject to the further terms and conditions hereafter set forth in this agreement.

(b) The Operating Company hereby agrees to furnish a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owning Companies, and to operate such properties for the term hereof; provided, however, that the Operating Com-

pany may at its option (conditional however upon the preservation in the Owing Companies of their present leasehold rights) discontinue for such time as the Operating Company may deem desirable the actual physical operation of any part or parts of [108] said properties if the same is not consistent with the efficient and economical management of all of said properties considered as a whole.

(c) The Owing Companies hereby grant unto the Operating Company the right to use their properties for advertising purposes, including uniform painting of motor trucks and other vehicles.

(d) The Operating Company shall furnish at its own expense all materials and supplies, and all labor and superintendence, for the maintenance and operation of the properties of the Owing Companies.

#### Section 5. Maintenance and upkeep.

The Operating Company shall maintain and keep in first-class operating condition all buildings, structures and equipment of every sort and nature of the Owing Companies subject to the provisions of this agreement; provided, however, that upon the termination of this agreement howsoever the Operating Company shall not be liable unto the Owing Companies to do more than to return to them their respective properties in substantially the same condition as when received by the Operating Company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion,

amortization and obsolescence hereafter referred to. The Operating Company shall be at liberty to make such additions to, betterments of, and improvements in the respective properties during the term hereof as in its judgment may seem desirable in connection with efficient operation of the business, and to carry out such retirements and/or replacements as in its judgment are necessary to accomplish the same purpose, [109] the costs of which additions, betterments, improvements and replacements shall be paid by the Operating Company and charged to the current account of the Owning Company or Companies involved.

#### Section 6. Accounting Methods.

The Operating Company agrees to keep and maintain such books and accounts for each of the Owning Companies in accordance with such modern and approved accounting methods as will comply with the requirements of the Trust Indentures above referred to, recording therein proper entries affecting depreciation, depletion, amortization and obsolescence of each of said properties as well as entries recording the transactions between the parties hereto, and other matters properly and customarily stated in books of account in recording transactions and evidencing the results thereof. The accounting methods to be used by the Operating Company pursuant to the provisions of this section shall be subject to the approval of Haskins & Sells, or other duly certified public accountants satisfactory to the Operating Company and each of the Owning Companies as to their respective properties.



Section 7. Compliance by Owning Companies with provisions of Trust Indentures.

The Operating Company hereby undertakes and agrees to pay unto the Union Company and unto the Consumers Company such amounts from time to time as will enable them punctually to carry out and perform all provisions of said Trust Indentures relating to payment of bond interest and provisions relating to sinking funds; and the Operating Company agrees as the agent of the Union Company to carry out and perform in so far as it lawfully may the particular covenants of the Union Company as contained in Article III, Sections 3 and 4, Sections 7 to 10, inclusive, the last sentence of the first paragraph of Section 11, Sections 16 to 19, inclusive, and Section 21 of said Trust Indenture of September 1, 1927, and the Operating Company further agrees as the agent of the Consumers Company to carry out and perform in so far as it lawfully may the particular covenants of the Consumers Company as contained in Article III, Section 3, Sections 6 to 9, inclusive, the last sentence of the first paragraph of Section 10, Sections 15 to 17, inclusive, and Section 19 of said Trust Indenture of July 1, 1928; and as the agent of the Reliance Company the Operating Company shall in so far as it lawfully may carry out and perform the same duties and obligations with respect to the Reliance Company in so far as the same, irrespective of Trust Indenture, may be applicable thereto, including payment of all taxes, charges and assessments of every sort and nature; but with the further understanding that the Operating Company shall be privileged under the provisions of the law of the United States as it now is or hereafter may be to file consolidated income tax returns and to pay the same upon behalf of all the parties to this



agreement. All funds in connection with performance by the Operating Company of its obligations in this section stated shall be furnished and paid by the Operating Company, but all payments made by the Operating Company with respect to sinking funds for redemption of bonds shall be charged to the current accounts of the Union Company and the Consumers Company, respectively.

#### Section 8. Claims and suits.

The Operating Company hereby undertakes and agrees (1) to indemnify the Owing Companies against and hold them and each of them harmless from all claims, demands, actions, causes of action, judgments [111] and awards of every sort and nature by reason of injury to or death of persons or loss of or damage to property caused by or arising from, either directly or indirectly, the operations of the Operating Company hereunder; and (2) upon behalf of the Owing Companies respectively to defend and/or settle and pay any claims or suits against any of the Owing Companies existing and of which the Operating Company had knowledge on the effective date of this agreement, but expressly excepting and excluding any claims or suits against any of said Owing Companies not a matter of record upon the books of the Owing Companies upon said date and unknown to the Operating Company, and further expressly excepting and excluding any claims or suits based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All amounts, including costs and expenses, incident to matters covered by this subdivision (2) of this section paid by the Operating Company shall be deemed paid by it as agent

and upon behalf of the Owing Companies, respectively, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

Section 9. Assumption by the Operating Company of Liabilities.

The Operating Company hereby assumes and agrees to pay on behalf of the Owing Companies all notes, bills and accounts payable appearing upon the books or records of the Owing Companies on the effective date of this agreement and any other bills payable not so appearing but of which the Operating Company had notice on or prior to said date; provided, however, that the Operating Company shall [112] be privileged to defend the same or any thereof if illegal, unjust or otherwise inequitable or unfair, and provided further that the Operating Company does not assume or agree to pay any notes, bills or accounts payable based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All payments made by the Operating Company pursuant to the provisions of this section shall be deemed paid by it as agent and upon behalf of the Owing Companies, respectively, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

Section 10. Operating Expenses and Revenues.

The Operating Company hereby undertakes and agrees to bear and pay the following operating expenses, namely: (a) all maintenance and operating expense of the proper-

ties herein referred to during the term hereof, including that of its own operating organization which shall act solely and exclusively in the premises, (b) all expense incident to the maintenance of the corporate existence of the respective parties hereto, (c) amounts equivalent to installments of interest on funded debt as required by said Trust Indenture (as hereinabove in Section 7 referred to, wherein provision is also made for payment by the Operating Company of such amounts from time to time as will enable the Union Company and the Consumers Company to carry out and perform all provisions of said Trust Indentures relating to sinking funds for redemption of bonds), (d) all taxes, state and Federal (for the purposes hereof deemed operating expense), and (e) all other operating charges and expenses of the Owing Companies of every sort and nature, including items of de- [113]preciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the Owing Companies and shall be paid to said Owing Companies as and when provided in Section 14 hereof, and in consideration thereof the Operating Company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties.

#### Section 11. Compensation.

Since the Operating Company herein covenants and agrees to furnish the Owing Companies with a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owing Companies, thus relieving the Owing Companies of the burden of maintaining separate and distinct operating or-



ganizations, and since under the provisions hereof the Operating Company covenants and agrees to pay the amount of all fixed charges and all other expenses of the Owing Companies and to protect them and each of them against any operating deficit, it is distinctly understood and agreed that the covenants of the Operating Company herein contained shall be and they are full and adequate consideration for the covenants of the Owing Companies herein set forth.

#### Section 12. Option to Purchase.

Each of the Owing Companies hereby grants unto the Operating Company throughout the term hereof the option to purchase its properties the ownership of which is retained pursuant to the provisions of Section 3 hereof, in consideration of payment of a sum of money equivalent to the appraised value of said properties as determined by a board of three appraisers, one to be appointed by the [114] Operating Company, one by the Owing Company involved, and the third by the two appraisers so appointed; provided, however, that with respect to the properties of the Union Company and the Consumers Company the price to be paid shall not in any event be less than the redemption price of all then outstanding bonds, plus accrued interest.

Should the Operating Company consider the advisability of the purchase of the properties of any of the Owing Companies it may require the appraisement above referred to by written demand therefor, naming its appraiser. Within thirty (30) days after receipt of such demand the Owing Company shall name its appraiser and notify the Operating Company in writing thereof, but if within said period the Owing Company shall not



have chosen its appraiser and notified the Operating Company in writing thereof, the Operating Company shall have the right to name the Owing Company's appraiser, the Owing Company to be notified in writing thereof. The two so appointed shall appoint the third appraiser. Should the board of three appraisers be unable to agree as to the value of said properties, they shall call in two additional appraisers and the decision of the majority of said board of five shall be deemed the value of said properties. The Operating Company shall have thirty (30) days after receipt of the written return of said appraisers within which to elect to exercise said option. Exercise of said option shall be by notice in writing. All costs of appraisalment shall be borne and paid by the Operating Company.

### Section 13. Term.

Unless earlier terminated by mutual consent of all parties hereto, this agreement shall remain in effect until terminated by [115] thirty (30) days written notice by all of the Owing Companies unto the Operating Company, or conversely by thirty (30) days written notice from the Operating Company unto all of the Owing Companies, it being further provided in this connection that should any one or more of the Owing Companies wish to withdraw herefrom during the term hereof it or they shall have the privilege of so doing upon giving the notice hereinabove mentioned, and conversely should the Operating Company desire at any time during the term hereof to discontinue operation of any one or more of said properties it may do so by such thirty (30) days notice to the owner or owners of said property or properties.

## Section 14. Final Accounting.

Upon termination of this agreement as to any one or more of said Owning Companies the possession and custody of the properties of such company or companies the ownership of which is retained pursuant to the provisions of Section 3 hereof shall be revested by the Operating Company in the owner or owners thereof, and in that event a financial adjustment shall be made as between the Operating Company and any such Owning Company or Companies, in accordance with the current account of the parties on date of return of said properties; and payment shall thereupon be made in accordance therewith.

## Section 15. Successors and Assigns.

This agreement shall be binding upon the respective successors and assigns of the parties hereto; provided, however, that the Operating Company shall not assign this agreement or any right or privilege herein conferred without the written consent of the Owning Companies then party hereto. [116]

## Section 16. Benefits of this Agreement.

It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof.

In Witness Whereof, the parties hereto have caused this agreement to be executed upon their behalf by their respective officers thereunto duly authorized, and their respective corporate seals hereunto affixed, as of the date herein first written.

CONSOLIDATED ROCK PRODUCTS CO.,

By E. F. Nyswander, Jr. (signed)

Its Vice-President.

ATTEST:

John D. Gregg (signed)

Secretary.

UNION ROCK COMPANY,

By S. W. Burford (signed)

Its President

ATTEST:

Robt. Mitchell (signed)

Asst. Secretary

CONSUMERS ROCK & GRAVEL COMPANY, INC.

By S. W. Burford (signed)

Its President

ATTEST:

Robt. Mitchell (signed)

Asst. Secretary

RELIANCE ROCK COMPANY,

By S. W. Burford (signed)

Its President

ATTEST:

Robt. Mitchell (signed)

Asst. Secretary. [117]

## [EXHIBIT 10]

## OPERATING AGREEMENT

Agreement, made and entered into in duplicate original this 8th day of April, 1930, by and between Consolidated Rock Products Co., a corporation duly organized and existing under the laws of the State of Delaware, and duly authorized to do and doing business within the State of California, Party of the First Part, hereinafter referred to as "Operating Company", and Sunset Rock Products Company and Sunset Rock Products Company, Inc., both corporations duly organized and existing under the laws of the State of California, and duly authorized to do and doing business therein, parties of the Second Part, hereinafter for convenience referred to collectively as "Owning Company".

This Indenture, Witnesseth:

## Recitals

The Operating Company and the Owning Company have each been engaged in the production, transportation and sale of rock and rock products, maintaining therefor separate operating organizations. The Operating Company is the beneficial owner of all of the issued and outstanding capital stock of the Owning Company, and the latter by reason of such stock ownership is a subsidiary of the Operating Company. Under the circumstances, the maintenance by each of separate and distinct operating organizations is not consistent with efficient and economical management; and results in duplicated production, transportation and sales expense, with attendant increased costs to the purchasing public of rock and rock products. Therefore, in the public interest as well as in



the interests of the parties hereto, it is proposed that the Operating Company maintain and operate the properties [118] of the Owning Company as hereinafter more particularly referred to under one operating organization. The economies thereof will result in material savings to the purchasing public of rock and rock products, will permit of reasonable returns from operation of the business, and will result in the maintenance of competition with other rock companies operating in this territory, upon a fair and wholesome basis.

An agreement between the parties hereto has been reached as hereafter stated.

### Agreement

Now, Therefore, It Is Mutually Understood and Agreed By and Between the Parties Hereto as Follows:

#### Section 1. Effective date.

The effective date of this agreement shall be the 1st day of April, 1930, and this agreement shall be deemed as having been entered into on and as of that date.

#### Section 2. Properties of the Owning Company subject hereto.

The properties of the Owning Company to be maintained and operated by the Operating Company pursuant to the provisions of this Agreement shall be (except as herein expressly excepted and excluded) all of its property real and personal and wheresoever situate. It is understood that all cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of ma-

materials shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company. Notwithstanding anything to the con- [119] trary herein, any contracts for the purchase of materials or supplies are expressly excepted and excluded herefrom unless the Operating Company shall elect to accept the same by written notice unto the Owning Company and the other party or parties to any such transaction. The term "properties" as hereafter used shall be deemed to mean and include the properties of the Owning Company as next hereinabove referred to.

### Section 3. Ownership.

It is understood and agreed, notwithstanding anything to the contrary herein contained, that the ownership of said properties (other than cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, which are subject to transfer and assignment as herein provided) shall be and remain in the Owning Company; and that the Operating Company shall have no estate therein and no rights therein or thereto except as herein provided, the Operating Company acting solely as an operating agency of the Owning Company in the maintenance and operation of the Properties of the latter.

### Section 4. Operation of properties by Operating Company.

(a) For the sole purpose of maintenance and operation thereof, and the production, transportation and sale

of rock and rock products therefrom, (1) the Owing Company hereby vests in the Operating Company for the term hereof the possession and custody of its properties above referred to, the ownership of which is retained by the Owing Company, and (2) the Owing Company hereby assigns and transfers unto the Operating Company all of its cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials [120] in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, and agrees to furnish such other and further documents as the Operating Company may require to effectuate such assignment and transfer. The Operating Company hereby accepts said assignment and transfer and the possession and custody of the properties above referred to for the purposes herein stated; it being mutually understood, however, that the same shall be subject to the further terms and conditions hereafter set forth in this agreement.

(b) The Operating Company hereby agrees to furnish a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owing Company, and to operate such properties for the term hereof; provided, however, that the Operating Company may at its option (conditional however upon the preservation in the Owing Company of its present leasehold rights) discontinue for such time as the Operating Company may deem desirable the actual physical operation of any part or parts of said properties if the same is not consistent with the efficient and economical management of all of said properties considered as a whole.



(c) The Owing Company hereby grants unto the Operating Company the right to use its properties for advertising purposes, including uniform painting of motor trucks and other vehicles.

(d) The Operating Company shall furnish at its own expense all materials and supplies, and all labor and superintendence, for the maintenance and operating of the properties of the Owing Company.

#### Section 5. Maintenance and unkeep.

The Operating Company shall maintain and keep in first-class operating condition all buildings, structures and equipment of every [121] sort and nature of the Owing Company subject to the provisions of this agreement, provided, however, that upon the termination of this agreement howsoever the Operating Company shall not be liable unto the Owing Company to do more than to surrender the properties of the Owing Company in substantially the same condition as when received by the Operating Company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to. The Operating Company shall be at liberty to make such additions to, betterments of, and improvements in said properties during the term hereof as in its judgment may seem desirable in connection with efficient operation of the business, and to carry out such retirements and/or replacements as in its judgment are necessary to accomplish the same purpose, the costs of which additions, betterments, improvements and replacements



shall be paid by the Operating Company and charged to the current account of the Owning Company.

#### Section 6. Accounting Methods.

The Operating Company agrees to keep and maintain books and accounts for the Owning Company in accordance with modern and approved accounting methods, recording therein proper entries affecting depreciation, depletion, amortization and obsolescence of each of said properties as well as entries recording the transactions between the parties hereto, and other matters properly and customarily stated in books of account in recording transactions and evidencing the results thereof. The accounting methods to be used by the Operating Company pursuant to the provisions of this section shall be subject to the ap- [122] proval of Haskins & Sells, or other duly certified public accountants satisfactory to the Operating Company and the Owning Company.

#### Section 7. Claims and suits.

The Operating Company hereby undertakes and agrees (1) to indemnify the Owning Company against and hold it harmless from all claims, demands, actions, causes of action, judgments and awards of every sort and nature by reason of injury to or death of persons or loss of or damage to property caused by or arising from, either directly or indirectly, the operations of the Operating Company hereunder; and (2) upon behalf of the Owning Company to defend and/or settle and pay any claims or suits against the Owning Company existing and of which the Operating Company had knowledge on the effective date of this agreement, but expressly excepting and excluding any claims or suits against said Owning Com-

pany not a matter of record upon the books of the Owning Company upon said date and unknown to the Operating Company, and further expressly excepting and excluding any claims or suits based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All amounts, including costs and expenses, incident to matters covered by this subdivision (2) of this section paid by the Operating Company shall be deemed paid by it as agent and upon behalf of the Owning Company, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties. [123]

#### Section 8. Assumption by the Operating Company of Liabilities

The Operating Company hereby assumes and agrees to pay on behalf of the Owning Company all notes, bills and accounts payable appearing upon the books or records of the Owning Company on the effective date of this agreement and any other bills payable not so appearing but of which the Operating Company had notice on or prior to said date; provided, however, that the Operating Company shall be privileged to defend the same or any thereof if illegal, unjust or otherwise inequitable or unfair, and provided further that the Operating Company does not assume or agree to pay any notes, bills or accounts payable based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the

same as hereinabove provided. All payments made by the Operating Company pursuant to the provisions of this section shall be deemed paid by it as agent and upon behalf of the Owning Company, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

#### Section 9. Operating Expenses and Revenues.

The Operating Company hereby undertakes and agrees to bear and pay the following operating expenses, namely: (a) all maintenance and operating expense of the properties herein referred to during the term hereof, including that of its own operating organization which shall act solely and exclusively in the premises, (b) all expense incident to the maintenance of the corporate existence of the parties hereto, (c) all taxes, state and Federal (for the purposes [124] hereof deemed operating expense), with the understanding that the Operating Company shall be privileged under the provisions of the law of the United States as it now is or hereafter may be to file consolidated income tax returns and to pay the same upon behalf of the parties to this agreement, and (d) all other operating charges and expenses of the Owning Company of every sort and nature, including items of Depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the Owning Company and shall be paid to said Owning Company as and when provided in Section 13 hereof, and in consideration thereof the Operating Company shall be and it is hereby authorized to retain for its

own use and benefit all net revenues from the operation of said properties.

#### Section 10. Compensation.

Since the Operating Company herein covenants and agrees to furnish the Owing Company with a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owing Company, thus relieving the Owing Company of the burden of maintaining a separate and distinct operating organization, and since under the provisions hereof the Operating Company covenants and agrees to pay all maintenance and operating expenses of the Owing Company and to protect it against any operating deficit, it is distinctly understood and agreed that the covenants of the Operating Company herein contained shall be and they are full and adequate consideration for the covenants of the Owing Company herein set forth. [125]

#### Section 11. Option to Purchase.

The Owing Company hereby grants unto the Operating Company throughout the term hereof the option to purchase its properties the ownership of which is retained pursuant to the provisions of Section 3 hereof, in consideration of payment of a sum of money equivalent to the appraised value of said properties as determined by a board of three appraisers, one to be appointed by the Operating Company, one by the Owing Company, and the third by the two appraisers so appointed.



Should the Operating Company consider the advisability of the purchase of the properties of the Owing Company it may require the appraisement above referred to by written demand therefor, naming its appraiser. Within thirty (30) days after receipt of such demand the Owing Company shall name its appraiser and notify the Operating Company in writing thereof, but if within said period the Owing Company shall not have chosen its appraiser and notified the Operating Company in writing thereof, the Operating Company shall have the right to name the Owing Company's appraiser, the Owing Company to be notified in writing thereof. The two so appointed shall appoint the third appraiser. Should the board of three appraisers be unable to agree as to the value of said properties, they shall call in two additional appraisers and the decision of the majority of said board of five shall be deemed the value of said properties. The Operating Company shall have thirty (30) days after receipt of the written return of said appraisers within which to elect to exercise said option. Exercise of said option shall be by notice in writing. All costs of appraisement shall be borne and paid by the Operating Company. [126]

#### Section 12. Term.

Unless earlier terminated by mutual consent of the parties hereto, this agreement shall remain in effect until terminated by thirty (30) days' written notice by either party hereto unto the other.

### Section 13. Final Accounting.

Upon termination of this agreement, the possession and custody of the properties of Owing Company, the ownership of which is retained pursuant to the provisions of Section 3 hereof, shall be revested by the Operating Company in said Owing Company, and in that event a financial adjustment shall be made as between the Operating Company and the Owing Company, in accordance with the current account of the parties on date of return of said properties; and payment shall thereupon be made in accordance therewith.

### Section 14. Successors and Assigns.

This agreement shall be binding upon the respective successors and assigns of the parties hereto; provided, however, that the Operating Company shall not assign this agreement or any right or privilege herein conferred without the written consent of the Owing Company.

### Section 15. Benefits of this Agreement.

It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof. [127]

In Witness Whereof, the parties hereto have caused this agreement to be executed upon their behalf by their respective officers thereunto duly authorized, and their respective corporate seals hereunto affixed, as of the date herein first written.

CONSOLIDATED ROCK PRODUCTS CO.,

By F. J. Twaits (signed)

Its President

Attest:

Robt. Mitchell (signed)

Asst. Secretary

SUNSET ROCK PRODUCTS COMPANY

By W. P. Jeffries (signed)

Its President

Attest:

B. F. Nyswander, Jr. (signed)

Secretary

SUNSET ROCK PRODUCTS COMPANY,  
INC.

By W. P. Jeffries (signed)

Its President

Attest:

B. F. Nyswander, Jr. (signed)

Secretary. [128]

## [EXHIBIT 11]

## MODIFICATION OF OPERATING AGREEMENT

This Agreement made and entered into in quadruplicate original this 16th day of February, 1933, by and between:

Consolidated Rock Products Co., a corporation duly organized and existing under the laws of the state of Delaware, party of the one part, hereinafter called "Operating Company", and

Union Rock Company, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Union Company", Consumers Rock & Gravel Company, Inc., a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Consumers Company", and Reliance Rock Company, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Reliance Company", parties of the other part, for convenience referred to hereinafter collectively as "Owning Companies"; all of the parties hereto being duly authorized to do and doing business in the State of California.

## Witnesseth:

That Whereas the parties hereto, under date of July 15, 1929, but effective as of April 1, 1929, entered into a certain agreement, designated "Operating Agreement", setting forth the mutual obligations of the parties hereto, concerning operation by Operating Company of the properties of Owning Companies, and



Whereas under said agreement it was provided that Operating Company was to be charged with depreciation, amortization, depletion and obsolescence, hereinafter referred to as "depreciation", on the properties of the Owing Companies, without setting forth the basis therefor, and whereas depreciation has been set up by the accountants based on the then book value of Owing Companies' properties, and [129]

Whereas it appears to Operating Company and Owing Companies that the depreciation on said basis was and is unfair, inequitable and actually not contemplated by the parties at the time the agreement was entered into, and

Whereas said agreement contains no default provision and it is believed that one should be set forth, and

Whereas, pursuant to said agreement it was provided that any party thereto could terminate said operating agreement as to its particular property upon thirty (30) days' written notice of its intention so to do, and

Whereas Operating Company is unwilling to proceed further under said operating agreement unless it is revised and changed both as to said depreciation and as to said termination, and

Whereas it is deemed not only extremely desirable and advantageous to Owing Companies that said operating agreement continue, but is also deemed fair and equitable and in accordance with what should have been the original agreement of the parties hereto, that said depreciation be adjusted along the lines hereinafter set forth and that said agreement be for a fixed period terminable prior thereto only with the written consent of

Operating Company and any two of Owning Companies, so that no one of Owning Companies, nor Operating Company, can withdraw from said operating agreement and thereby actually destroy the purpose thereof, and

Whereas Operating Company is willing as a part of the consideration for the execution of this agreement to forego and cancel its option to purchase the property of Owning Companies set forth in Section 12 of the above mentioned operating agreement, [130]

Now Therefore, for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration in hand paid by Operating Company to each of Owning Companies, receipt of which is hereby respectively acknowledged, and also in consideration of the covenants and agreements herein contained, it is mutually understood and agreed that said operating agreement is hereby modified in the following manner, to-wit:

1. That the option to purchase set forth in Section 12 is hereby eliminated and cancelled.

2. That anything in said operating agreement contained to the contrary notwithstanding—and regardless of how said item may be absorbed or set up by the individual Owning Companies—the “depreciation” to be credited to the Owning Companies’ account by the Operating Company shall actually be credited only upon the termination of the agreement and that at said time it shall be arrived at upon the following basis: The Operating Company and each Owning Company shall within five days after such termination appoint one appraiser. Within five days thereafter the appraiser of the Operating Company with the appraiser from each respective Owning Company shall appoint a third appraiser. Within ninety

days after the appraisers are so appointed, they shall as to the respective properties ascertain the amount of the depreciation which should be credited to the respective Owing Companies for the period of the agreement, starting April 1, 1929 and ending with the date of termination. Such depreciation shall be based upon the appraised actual values of said properties, regardless of book values, starting April 1, 1929 and reappraised as of the first day of April of each year thereafter. The [131] basis of depreciation shall also be determined by said appraisers in such report and shall be such basis as is usual and customary in said business—taking into consideration the use made thereof by Operating Company—and fair and equitable to the Operating Company and the respective Owing Companies. The figures so arrived at shall be the amount to be credited to the account of the Owing Companies respectively, and settlement between the Operating Company and the respective Owing Companies shall be made within ten days after the completion of said appraisal in accordance with the current account of the parties on said date. It is specifically understood and agreed, however, that in the financial adjustment and payment between the Operating and Owing Companies, as herein and in said Operating Agreement specified, the portion of such adjustment represented by “depreciation”, determined as aforesaid, may be paid by Operating Company to the respective Owing Companies in cash, or at Operating Company’s option may, with a five per cent penalty added thereto, be paid twenty-five per cent in ten equal annual installments and the entire balance at the end of the tenth year. Said installments shall be evidenced by separate promissory notes bearing interest at the rate of five per cent per annum, payable at maturity.



The Operating Company may appoint one appraiser for appraisal of all of the Owing Companies' properties, or may appoint one for each of them, or make such appointments in any manner it sees fit. Owing Companies may each appoint separate appraisers or may jointly appoint one appraiser for all their properties. In any event, however, the appraisals shall be separate as to each Owing Company. The expense of the appraisals shall be borne one- [132] half by the Operating Company and one-half by the respective Owing Companies, or the respective Owing Companies may together pay their proportions of one-half if only one appraiser is appointed by them jointly.

Should either of the parties hereto fail to appoint its appraiser within the time herein named, or should the two so appointed fail to appoint a third within the stated period, then either party not in default in such appointment may make application to the presiding Judge of the Superior Court of Los Angeles County for such appointment, and any appraiser or appraisers so appointed shall have like powers to those which would have vested in an appraiser had he been appointed as hereinabove set forth.

3. That in lieu of the term specified in Section 13 of said operating agreement, the term shall be five years from the date hereof, subject, however, to termination prior thereto in the event of default as hereinafter specified or by written consent to earlier termination by any two of Owing Companies and Operating Company. Operating Company is hereby given the option to extend said operating agreement as hereby modified for a further term of five years upon the same terms and conditions, provided that notice of its intention to extend said



term is given to each of Owning Companies within one year of the date of expiration of the original term in this paragraph specified.

4. In the event of default under said operating agreement on the part of Operating Company, any one of Owning Companies as to which a default exists may give Operating Company sixty days' written notice specifying such default, and should the default so [133] specified be not cured within said period, then this agreement may thereupon be terminated by such Owning Company as to its properties.

In the event of default hereunder by any Owning Company and failure to cure such default within sixty days after written notice thereof is given by Operating Company to such Owning Company, then Operating Company may terminate this agreement as to such Owning Company.

In the event that any Owning Company goes into default and said agreement is terminated as to it by Operating Company as hereinabove specified, or in the event any Owning Company withdraws the whole or any part of its properties from Operating Company for any reason other than default on the part of Operating Company and termination thereby, or termination of this agreement by written consent as hereinabove specified, then such Owning Company shall forfeit its right to a settlement with Operating Company for any item of depreciation to which it would have been entitled had the agreement been permitted to run for its full term.

Except as herein specifically modified the aforesaid operating agreement is and shall be deemed to be in full force and effect in all of its terms and conditions, it

being specifically understood and agreed, however, that in case of conflict between said operating agreement and this modification agreement, this agreement shall govern.

This agreement shall inure to the benefit of and be binding upon the respective successors and assigns of each of the parties hereto. [134]

In Witness Whereof the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized, and their corporate seals to be hereunto affixed, the day and year first above written.

CONSOLIDATED ROCK PRODUCTS CO.

By F. J. Twaits (signed)

President

By Robt. Mitchell (signed)

Secretary

UNION ROCK COMPANY

By F. J. Twaits (signed)

President

By Robt. Mitchell (signed)

Secretary

CONSUMERS ROCK & GRAVEL COMPANY,  
INC.

By F. J. Twaits (signed)

President

By Robt. Mitchell (signed)

Secretary

RELIANCE ROCK COMPANY

By F. J. Twaits (signed)

President

By Robt. Mitchell (signed)

Secretary [135]

[EXHIBIT 12]

[Title of District Court and Cause.]

ORDER

This Court, by its orders filed herein on May 24th, 1935, having temporarily continued the debtor in possession of its property and the properties of its subsidiaries Union Rock Company, a Delaware corporation, and Consumers Rock & Gravel Company, Inc., a Delaware corporation, and having provided for certain other and further relief, and having directed the debtor to give notice of a hearing to be held before this Court in the courtroom of the United States District Court for the Southern District of California, Central Division, Judge Hollzer's courtroom, in the Federal Building, Temple and Main Streets, Los Angeles, California, on the 24th day of June, 1936, at 10:00 o'clock A. M. to determine whether or not the Court shall continue the debtor in possession or appoint a trustee or trustees, and proof having been made of the due publication and the mailing of said notice of hearing, as directed in the said orders, and these proceedings having come on for further hearing at the place and time above mentioned, and the Court having heard the arguments of Gibson, Dunn & Crutcher and O'Melveny, Tuller & Myers, Counsel respectively for the bondholders' committees of Consumers Rock & Gravel Company and Union Rock Company, and counsel for debtor, being fully advised in the premises and being satisfied [136] that the debtor should be continued in possession of its properties and business and the properties and business of its subsidiaries Union Rock Company and Consumers Rock & Gravel Company, Inc., upon

motion of Latham, Watkins & Bouchard, counsel for the debtor, it is hereby ordered, adjudged and decreed as follows:

(1) That the debtor, pending further order of this Court, shall be continued in possession of its properties and the properties of its said subsidiaries, shall operate the business thereof, and shall have and may exercise, consistently with the provisions of Section 77-B of an Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, as amended and supplemented (hereinafter referred to as the "Bankruptcy Act"), all of the powers of a trustee appointed pursuant to Section 44 of said Bankruptcy Act, and the same powers as those exercised by a receiver in equity, to the extent consistent with Section 77-B of said Bankruptcy Act, all subject to the control of this Court, and without prejudice to the right of any bondholder, bondholders' committee, or other creditor, or any stockholder of the debtor or any subsidiary of the debtor, at any time during the pendency of this proceeding, to petition this court for the appointment of a trustee or trustees of the properties of the debtor and its subsidiaries, and this court hereby reserves jurisdiction to make such appointment pursuant to any such petition upon such showing, hearing, and notice as this court may deem sufficient.

(2) That the debtor herein be and hereby is authorized and directed, pending further order of this Court, to run, manage, maintain, operate, and keep in proper condition and repair, the assets and property of the debtor and its said subsidiaries, whether or not in this Southern District of California, and to manage, operate, and conduct the



business of the debtor and its said subsidiaries, both within and without the Southern District of California, and to this [137] end to exercise its and their authority and franchises and discharge all duties obligatory upon it and them, and, subject to the compensation of certain officers and employees of the corporations, and subject to the further provision that no person shall be elected or appointed to any office to fill a vacancy, or otherwise, without the prior approval of this Court, and further subject to the power of this Court to fix and determine the reasonable compensation for services rendered and reimbursement for actual and necessary expenses incurred in connection with this proceeding, by officers, parties in interest, depositaries, reorganization managers and committees, or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor and its said subsidiaries, to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to collect and receive the income, rents, revenues, issues and profits of said assets, properties and business, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to aid and assist its subsidiary corporations as may be necessary to protect the debtor's interests therein, to continue, until further order of this Court, the existing, purchasing, selling, operating, business and financial subsidiary corporations to the extent that they may be necessary or advisable in order that the properties of the debtor and its subsidiary corporations may be operated as nearly as possible with the same policy of management, all in the same manner that it would be entitled and bound to do in its own right and to the extent necessary to protect and

preserve the assets, properties, and business of the debtor, all according to law and subject to such supervision and control of the Court as the Court may exercise by further orders entered herein, and, after provision for current expenses of the debtor in operating, managing, and preserving the assets and properties and con- [138] ducting the business of the debtor, including specifically, without limiting the generality of the foregoing, salaries, wages, and compensation of all officers, accountants, managers, superintendents, agents, employees, attorneys or counsel, retained or hired by the debtor, as aforesaid, the necessary rents or royalties, the cost of materials consumed in current operations, and insurance, Federal, State and municipal taxes, and the cost of water, light, heat, gas, and power, and, after provision for such ordinary capital expenditures as may be necessary for the proper conduct of the business of the debtor and its said subsidiaries, and the costs of maintaining the corporate existence of the debtor and its said subsidiaries, including the necessary expenses of the preservation of the records and the registration and transfer of its stock and bonds and the charges of the trustees under indentures under which securities of the debtor's subsidiaries have been issued, and the expenses of preparing and printing pleadings, petitions, orders, proposed plans pursuant to Section 77-B of the Bankruptcy Act, and all other papers now filed, or hereafter to be filed, herein, which are reasonably necessary to be prepared or printed in such quantity as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein and to hold any additional moneys that may come into the possession of the debtor and be

not expended for any of the aforesaid purposes, all subject to the further order of this Court.

(3) That the officers of the debtor are hereby authorized to make any and all payments and to draw any and all checks, in the ordinary conduct of the business of the debtor, and to open and/or maintain bank accounts in such bank, or banks, as may have heretofore been, or as may hereafter be, selected by the Board of Directors of the debtor, and to exercise such authority and control over said bank accounts as may have been heretofore granted, or as may here- [139] after be granted, to said officers by the Board of Directors of the debtor.

(4) That the debtor shall be allowed until July 15th, 1935, unless the time be extended further by order of this Court, within which to report to the Court as to the advisability of rejecting any contracts of the debtor, executory in whole or in part; and continued operation by the debtor, under any of said contracts within said period allowed for such reports or any extension thereof and until the entry of an order directing such rejection, shall not be deemed to conclude this Court or the debtor in respect of such election or to constitute an election.

(5) That all persons, firms and corporations are hereby enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suite or proceedings at law or in equity, or under any statute, against the debtor, or to enforce any lien or claim upon the estate or property of the debtor, and from levying or serving



of garnishments, attachments, executions or other process upon or against the debtor or any of its property, and from doing any act in any way interfering with the assets, property or business of the debtor, until after the entry of the final decree herein, and all sheriffs, marshals and their officers, and their advisors, representatives and servants, are hereby enjoined and restrained from seizing, selling, removing, transferring, disposing of, or attempting in any way to seize, sell, remove, transfer or dispose of, or in any way to interfere with any properties, assets or effects in the possession of the debtor, or owned by the debtor, and from doing any act whatsoever to interfere with the possession and management by the debtor of the assets, property and business of the debtor.

(6) That the debtor shall cause to be kept in its books of account opened as of midnight May 24th, 1935, due and proper ac- [140] counts of its earnings, expenses, receipts, and disbursements, and shall preserve proper vouchers for all payments and disbursements.

(7) That the debtor shall file with the Clerk of this Court, on or before the 20th day after the last day of each calendar month, a statement of the assets and liabilities of the debtor as of the last day of the preceding month, together with a summary statement of the revenues and expenses of the debtor for such month.

(8) That the schedules and other information required by Section 77-B of the Bankruptcy Act to be filed, or submitted, for the purpose of disclosing the conduct of the debtor's affairs and the fairness of any proposed plan



of reorganization, shall be filed, or submitted, by the debtor at such time, or times, as the Court may direct, and this Court reserves full right and jurisdiction, from time to time, to direct the debtor to file any such schedules, or information, as to dispense with the filing, or submission of the same.

(9) That the debtor shall prepare, within thirty (30) days from the date of this order, (a) a list of all known bondholders and creditors of, or claimants against, the debtor and its said subsidiaries, or its or their properties, and the amounts and character of their debts, claims and securities, and the last known post office address, or place of business, of each creditor or claimant, and (b) a list of the stockholders of each class of the debtor, with the last known post office address or place of business of each.

(10) That the said lists, in paragraph "(9)" hereof mentioned, shall be open to the inspection of any creditor or stockholder of the debtor, or any creditor of either of said subsidiaries, during reasonable business hours, upon application to the debtor at its executive offices, 2730 South Alameda Street, City of Los Angeles, California. [141]

(11) That this Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper, fixing the time within which any plan of reorganization shall be proposed, accepted and

confirmed, determining a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced, and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed, or evidenced, and allowed, and, for the purposes of any proposed plan of its acceptance, the classification of creditors and stockholders into classes according to the nature of their respective claims and interests, and, in general, such orders amplifying, extending, limiting, or otherwise modifying or amending this order, and any and all other orders now or hereafter made, as to the Court may, at any time, seem proper.

Dated: July 2nd, 1935.

HARRY A. HOLLZER

District Judge.

Approved as to form as provided in Rule 44.

GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland

Attorneys for Bondholders' Committee of Consumers  
Rock & Gravel Company, bondholders.

O'MELVENY, TULLER & MYERS,

By Graham L. Sterling, Jr.,

Attorneys for Bondholders' Committee of Union Rock  
Company, bondholders. [142]

# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

(Contributor's Name)

## For Calendar Year 1938

or Fiscal Year beginning \_\_\_\_\_, 1938, and ended \_\_\_\_\_, 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

ATLAS MIXED MORTAR COMPANY

(Name)

2730 South Alameda Street,

(Street and number)

Los Angeles, Los Angeles, California.

(Post office)

(County)

(State)

Inactive

Kind of business

File

Check

Serial

File

Index

(Contributor's Name)

RECEIVED

3-15-1939

LOS ANGELES

Check Check M. O.

Post Payment

### ADJUSTED NET INCOME COMPUTATION

GROSS INCOME				
Item No.				
1. Gross sales (where inventories are an income-determining factor).....	\$.....	Less returns and allowances.....	\$.....	
2. Less cost of goods sold (from Schedule B-1).....				
3. Gross profit from sales (Item 1 minus item 2).....				
4. Gross receipts (where inventories are not an income-determining factor).....	\$.....			
5. Less cost of operations (from Schedule B-2).....				
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....				
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1(1)).....				
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2)).....				
9. Rents. (See Instruction 19).....				
10. Royalties. (See Instruction 20).....				
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....				
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....				
12. Dividends (from Schedule E).....				
13. Other income (state nature of income).....				
14. Total income in items 3, and 6 to 13, inclusive.....				\$.....
DEDUCTIONS				
15. Compensation of officers (from Schedule F).....				
16. Salaries and wages (not deducted elsewhere).....				
17. Rent. (See Instruction 23).....				
18. Repairs. (See Instruction 24).....				
19. Bad debts (from Schedule G).....				
20. Interest. (See Instruction 26).....				
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....				
22. Contributions or gifts paid (from Schedule I).....				
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....				
24. Depreciation (from Schedule J).....				
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....				
26. Other deductions authorized by law (from Schedule K).....				
27. Total deductions in items 15 to 26, inclusive.....				
28. Net income for excess-profits tax computation (item 14 minus item 27).....				\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 33).....				
30. Net income (item 28 minus item 29).....				
31. Less: Interest on obligations of the United States (item 8, above).....				
32. Adjusted net income (item 30 minus item 31).....				\$ NONE

### EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$.....		
35. 10 percent of item 34.....	\$.....		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....			
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$.....		
38. Amount taxable at 6 percent (6 percent of item 34, but not more than item 37, and tax).....		6%	\$.....
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....	\$.....	12%	\$.....
40. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3).....			\$ NONE

### INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)				
41. Adjusted net income (item 32, above).....	\$ NONE			
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....				
43. Balance subject to income tax (item 41 minus item 42).....	\$.....			
44. Portion of item 43 (not in excess of \$5,000; and tax at 12% percent).....	\$.....	12%	\$.....	
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000; and tax at 14%.....	\$.....	14%	\$.....	
46. Portion of item 43 (in excess of \$20,000; and tax at 16 percent).....	\$.....	16%	\$.....	
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$.....	
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36).....				
49. Balance of income tax (item 47 minus item 48).....			\$ NONE	
50. Excess-profits tax (item 40, above).....			\$ NONE	
51. Total tax due (item 49 plus item 50).....			\$ NONE	

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (10 will be assessed if duplicate copy is not filed).

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AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell  
(State title)  
President

[Corporate Seal]

J. E. Gardner  
(State title)  
Secretary

Subscribed and sworn to before me this 15th day of March, 1939.

[Notarial Seal] George Rollnick, Notary Public

(Signature of officer (Title)  
administering oath)

GEORGE ROLLNICK

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[147]



# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$20,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

(Auditor's Name)

## For Calendar Year 1938

or Fiscal Year beginning \_\_\_\_\_, 1938, and ended \_\_\_\_\_, 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

ATLAS MIXED MORTAR COMPANY

(Phone)

2730 SOUTH ALAMEDA STREET,

(Street and number)

LOS ANGELES, LOS ANGELES, CALIFORNIA.

(Post office)

(County)

(State)

INACTIVE

Kind of business

File  
Code  
67  
Serial  
No. 866707

District

(Auditor's Name)

Cash

Check

M. O.

First Payment

### ADJUSTED NET INCOME COMPUTATION

Item No.	GROSS INCOME		
1. Gross sales (where inventories are an income-determining factor).....	\$	Less returns and allowances.....	\$
2. Less cost of goods sold (from Schedule B-1).....			
3. Gross profit from sales (item 1 minus item 2).....	\$		
4. Gross receipts (where inventories are not an income-determining factor).....	\$		
5. Less cost of operations (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-(1)).....			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-(2)).....			
9. Rents. (See Instruction 19).....			
10. Royalties. (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000). (b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....		Expenses assumed by parent company.....	
13. Other income (state nature of income).....		and credited by it to Atlas Mixed	
14. Total income in Items 3, and 6 to 13, inclusive. MORTAR COMPANY.....			\$ 140 67
DEDUCTIONS			
15. Compensation of officers (from Schedule F).....	\$		
16. Salaries and wages (not deducted elsewhere).....			
17. Rent. (See Instruction 23).....		85 00	
18. Repairs. (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest. (See Instruction 26).....			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			
24. Depreciation (from Schedule J).....		55 67	
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....			
26. Other deductions authorized by law (from Schedule K).....			
27. Total deductions in Items 15 to 26, inclusive.....			\$ 140 67
28. Net income for excess-profits tax computation (item 14 minus item 27).....			\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....			\$ NONE

### EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$		
35. 10 percent of item 34.....			
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....			
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$ NONE		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....		6%	\$
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....		12%	\$
40. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3).....			\$ NONE

### INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (item 32, above).....	\$ NONE		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....	\$		
43. Balance subject to income tax (item 41 minus item 42).....	\$		
44. Portion of item 43 (not in excess of \$5,000); and tax at 12 1/2 percent.....		12 1/2%	\$
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%.....		14%	\$
46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent.....		16%	\$
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$ NONE
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36).....			
49. Balance of income tax (item 47 minus item 48).....			\$
50. Excess-profits tax (item 40, above).....			
51. Total tax due (item 49 plus item 50).....			\$ NONE

NOTE—One form must be "DUPLICATE COPY" must be filed with this original return (318 will be assessed if duplicate copy is not filed).

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Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....
10. Excess of capital loss, if any, over  
amount allowable as a deduction in  
item 11 (a), page 1.....

11. Additions to surplus reserves (list each reserve separately):
  - (a) .....
  - (b) .....
  - (c) .....
  - (d) .....
12. Other unallowable deductions:
  - (a) .....
  - (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
  - (a) .....
  - (b) .....
14. Sundry debits to earned surplus (itemize):
  - (a) .....
  - (b) .....
  - (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 90,480.11
 

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16. Total of lines 1 to 15..... \$90,480.11
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$90,480.11
18. Adjusted net income (item 32, page 1).... ..

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.. ..

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

---

23. Total of lines 17 to 22..... \$90,480.11

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Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
		\$.....	\$.....	\$.....	\$.....			\$.....
.....								

SCHEDULE ATTACHED

Total. (Enter as item 24, page 1):.....\$.....

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[150]



	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
<b>ASSETS</b>				
1. Cash		\$		\$ 186 00
2. Notes and accounts receivable				
Less reserve for bad debts				
3. Inventories:				
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (items):				
Bonds of affiliated company			2,272 50	2,272 50
6. Capital assets:				
(a) Depreciable assets (items): Buildings	\$ 9,276 16		\$ 9,276 16	
Machinery and equipment	52,350 77		50,949 53	
Furniture and fixtures	3,219 09		3,219 09	
Total depreciable assets	\$ 64,845 02		\$ 63,444 78	
Less reserve for depreciation	63,113 08	1,732 94	61,925 64	1,519 14
(b) Depletable assets				
Less reserve for depletion				
(c) Land		13,350 48		1,599 13
7. Other assets (items): Interest accrued on bonds			\$ 2,880 00	
8. Total Assets		\$ 15,083 42		\$ 8,456 77
<b>LIABILITIES</b>				
9. Accounts payable		\$ 15,734 21		\$ 9,368 56
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year				
(b) With original maturity of 1 year or more				
11. Accrued expenses (items): Rent	\$ 255 00	255 00		
12. Other liabilities (items): Public improvement assessment bonds	\$ 24 32	24 32		24 32
13. Surplus reserves (items):				
14. Capital stock:				
(a) Preferred stock				
(b) Common stock		89,550 00		89,550 00
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits		90,480 11		90,480 11
17. Total Liabilities		\$ 15,083 42		\$ 8,456 77

QUESTIONS

- Business classification. (See instruction 16) Inactive  
If engaged in more than one of the business classifications indicated in instruction 16, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
- Date of incorporation Sept. 22, 1908
- State or country California
- State collector's office where your return for the preceding year was filed Los Angeles
- The corporation's books are kept at dated Rook Products Co.
- Located at 2730 South Alameda Street, L. A.
- Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? No. If so, an additional return on Form 1120 H must be filed.
- Is this a consolidated return of railroad corporations? No  
If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
- If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? Yes. If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
- Was the income of this corporation included in a consolidated return for any prior year? No. If so, give name and address of corporation which filed the consolidated return and the last year for which such return was filed.
- Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No. If answer is "yes," give name and address of each predecessor business and the date of the change in entity.
- Upon such change, were any asset values increased or decreased? No. If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
- Is this return made on the basis of cash receipts and disbursements? No. If not, describe fully what other basis or method was used in computing net income Accrual.
- State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None. If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock.
- Did the corporation make a return of information on Forms 1090 and 1099 (see instruction 10-(1)) for the calendar year 1938? No.
- Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No. (If answer is "yes," attach schedule as required by instruction 13-(2).)

AFFIDAVIT. (See instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that the return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this 1st day of MARCH, 1939.

George Rolnick NOTARY PUBLIC (Title) George Rolnick CORPORATE SEAL (State title)

AFFIDAVIT. (See instruction 7)

I/we (severally or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profit tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 1st day of 1939.

George Rolnick (Signature of officer submitting oath) (Title) George Rolnick (Signature of person preparing the return) (Name of firm or employer, if any)

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ATLAS MIXED MORTAR CO.

(A California Corporation)

Account Payable -- Parent Company

Analysis of changes during the Calendar Year 1938

Balance -- December 31, 1937	\$15,734.21
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Balance -- December 31, 1938	9,362.56
------------------------------	----------

Net decrease	\$ 6,371.65
--------------	-------------

ANALYSIS OF CHANGES

Charges:

Depreciation	\$55.67
--------------	---------

Accrued rent	85.00
--------------	-------

	\$ 140.67
--	-----------

Excess of depreciation provision, per books, over amount claimed for tax purposes	108.13
---	--------

Credit for property accounts	\$13,152.59
---------------------------------	-------------

Less reserve charges	1,351.24
-------------------------	----------

	11,801.35
--	-----------

Total Charges	\$12,050.15
---------------	-------------

## Credits:

Rent paid	\$ 340.00
Cash from sale of property	2,458.50
Accrued interest on bonds	2,880.00

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Total Credits	\$ 5,678.50
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NET CHARGES	\$ 6,371.65
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ATLAS MIXED MORTAR CO.  
(A California Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance Of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Mortar and Putty Plant	\$12,784.02		\$12,784.02	\$12,784.02		\$12,784.02					\$12,784.02	\$12,784.02
Fairbank Scales	1,395.02		\$ 1,395.02	\$ 1,395.02		1,395.02					1,395.02	1,395.02
Warehouse and Garage	7,101.26		7,101.26	7,101.26		7,101.26					7,101.26	7,101.26
Sludge Vats	1,274.14		1,274.14	1,274.14		1,274.14					1,274.14	1,274.14
Office Building	2,174.90		2,174.90	2,174.90		2,174.90					2,174.90	2,174.90
Office Furniture and Equipment	3,219.09		3,219.09	3,163.42		3,163.42	\$ 55.67	1	\$ 55.67		\$ 3,219.09	3,219.09
Automotive equipment	35,929.60	\$1,401.24	34,528.36	35,613.00	\$1,351.24	34,261.76	266.60	0	-	\$ 266.60*	34,528.36	34,261.76
Salvage	967.99	-	967.99	-	-	-	967.99	0		967.99	967.99	-
	<u>\$64,846.02</u>	<u>\$1,401.24</u>	<u>\$63,444.78</u>	<u>\$63,505.76</u>	<u>\$1,351.24</u>	<u>\$62,154.52</u>	<u>\$1,290.26</u>		<u>\$ 55.67</u>	<u>\$ 1,234.59</u>	<u>\$63,444.78</u>	<u>\$62,210.19</u>

\* Salvage value.

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Deficiency or excess of credits to depreciation reserve, per books, under or over depreciation claimed as per schedules attached to tax returns:

For the years 1934, 1935, 1936 and 1937

\$ 392.68

\$ 392.68

For the year 1938 - per books

\$ 163.80

For the year 1938 - per schedule above

52.67

108.13

\$ 108.13

Totals as per balance sheet at December 31, 1938

\$1,519.14

\$63,444.78

\$61,925.64

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T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T  
INTERNAL REVENUE SERVICE

Los Angeles, Calif.

Office of the Collector  
Sixth District of California  
In replying refer to - IT:LAL

March 9, 1939

Atlas Mixed Mortar Co.  
2730 South Alameda Street,  
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)  
COLLECTOR.

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[154]

Treasury Department

**1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938**

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

155

(Auditor's Name)

**For Calendar Year 1938**

or Fiscal Year beginning , 1938, and ended , 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

**BUILDERS CRUSHED ROCK PRODUCTS CO.**

(Name)

**2730 South Alameda Street,**

(Street and number)

**Los Angeles, Los Angeles, California**

(Post office)

(County)

(State)

Kind of business **Inactive**

File

Card

Serial

No.

District

(Auditor's Name)

3-1

Cash

Check

M. O.

First Payment

**ADJUSTED NET INCOME COMPUTATION**

**GROSS INCOME**

- Item No.
- Gross sales (where inventories are an income-determining factor) \$
  - Less: Returns and allowances \$
  - Gross profit from sales (item 1 minus item 2) \$
  - Gross profit (where inventories are not an income-determining factor) \$
  - Less cost of goods sold (from Schedule B-2) \$
  - Gross profit where inventories are not an income-determining factor (item 4 minus 5) \$
  - Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1) \$
  - Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2) \$
  - Rents. (See Instruction 19) \$
  - Royalties. (See Instruction 20) \$
  - (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000) \$
  - (b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D) \$
  - Dividends (from Schedule E) \$
  - Other income (state nature of income) \$
  - Total income in items 3, and 6 to 13, inclusive \$

**DEDUCTIONS**

- Compensation of officers (from Schedule F) \$
- Salaries and wages (not deducted elsewhere) \$
- Rent. (See Instruction 23) \$
- Repairs. (See Instruction 24) \$
- Bad debts (from Schedule G) \$
- Interest. (See Instruction 26) \$
- Taxes (from Schedule H). (Do not include Federal excess-profits tax) \$
- Contributions or gifts paid (from Schedule I) \$
- Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29) \$
- Depreciation (from Schedule J) \$
- Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31) \$
- Other deductions authorized by law (from Schedule K) \$
- Total deductions in items 15 to 26, inclusive \$
- Net income for excess-profits tax computation (item 14 minus item 27) \$
- Less: Federal excess-profits tax. (See Instruction 33) \$
- Net income (item 28 minus item 29) \$
- Less: Interest on obligations of the United States (item 8, above) \$
- Adjusted net income (item 30 minus item 31) \$

**EXCESS-PROFITS TAX COMPUTATION. (See Instruction 24)**

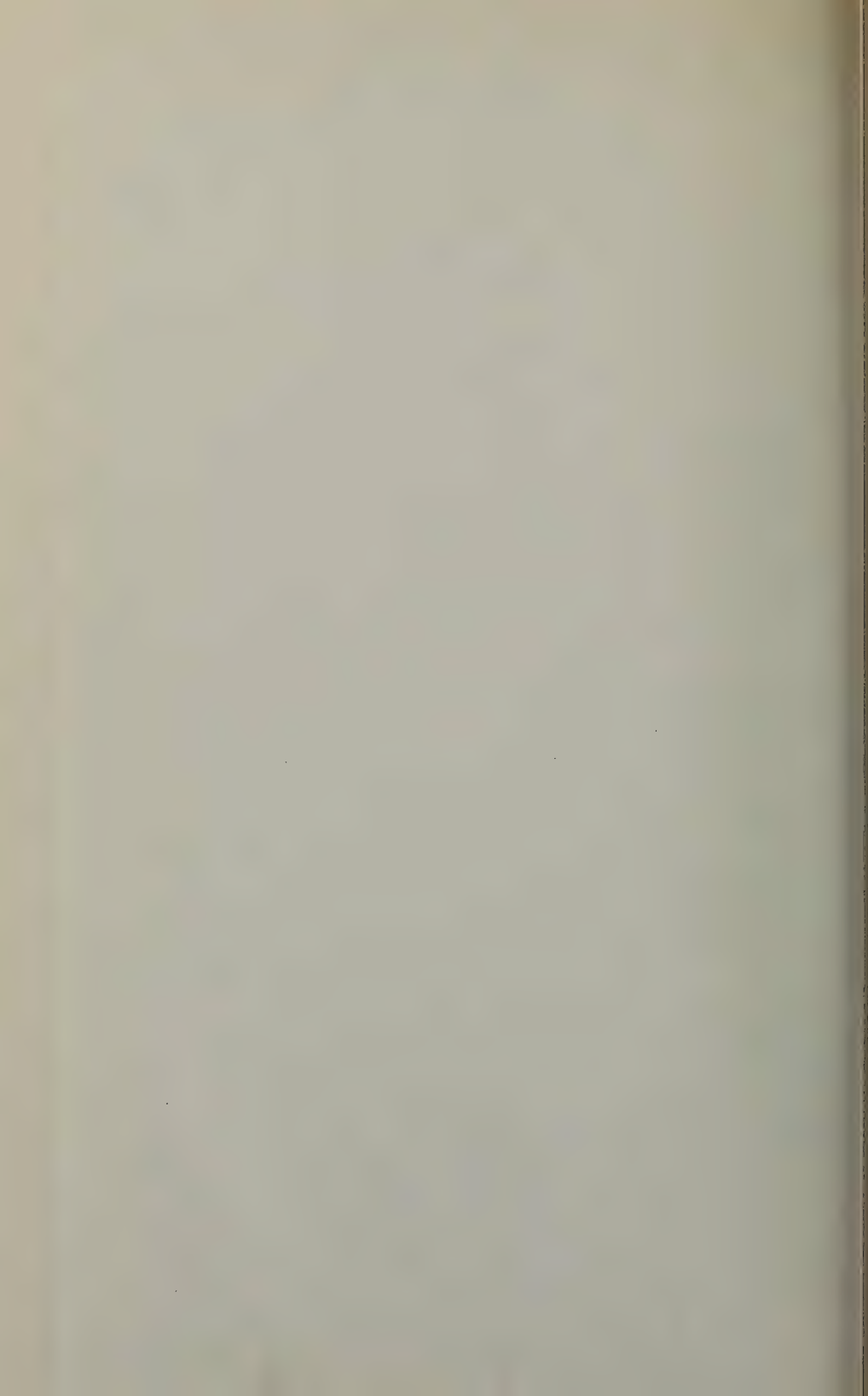
- | Item No.   | Column 1 | Col. 2<br>Rate | Column 3<br>Amount of Tax |
|--|----------|----------------|---------------------------|
| 23. Net income for excess-profits tax computation (item 28, above)   | \$ NONE  |                |                           |
| 24. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income-tax fiscal year began in 1938 and ended on or after July 31, 1939) | \$       |                |                           |
| 25. 10 percent of item 24  | \$       |                |                           |
| 26. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 23, above)  | \$       |                |                           |
| 27. Balance subject to excess-profits tax (item 23 minus total of items 25 and 26)   | \$       |                |                           |
| 28. Amount taxable at 6 percent (5 percent of item 24, but not more than item 27), and tax   | \$       | 6%             | \$                        |
| 29. Balance taxable at 12 percent (item 27 minus item 28, col. 1), and tax   | \$       | 12%            | \$                        |
| 30. Total excess-profits tax (total of item 28, col. 3, and item 29, col. 3)   |          |                | \$ NONE                   |

**INCOME TAX COMPUTATION**

- | Item No.   | Column 1 | Column 2<br>Rate | Column 3<br>Amount of Tax |
|--|----------|------------------|---------------------------|
| 41. Adjusted net income (item 32, above)   | \$ NONE  |                  |                           |
| 42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above)                                | \$       |                  |                           |
| 43. Balance subject to income tax (item 41 minus item 42)  | \$       |                  |                           |
| 44. Portion of item 43 (not in excess of \$5,000); and tax at 12 1/2 percent   | \$       | 12 1/2%          | \$                        |
| 45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%  | \$       | 14%              | \$                        |
| 46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent  | \$       | 16%              | \$                        |
| 47. Total income tax (total tax in col. 3 of items 44, 45, and 46)   |          |                  | \$                        |
| 48. Less: Credit for income taxes paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36) |          |                  | \$                        |
| 49. Balance of income tax (item 47 minus item 48)  |          |                  | \$ NONE                   |
| 50. Excess-profits tax (item 40, above)  |          |                  | \$ NONE                   |
| 51. Total tax due (item 49 plus item 50)   |          |                  | \$ NONE                   |

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (10 will be assessed if duplicate copy is not filed).

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AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell  
(State title)  
President

[Corporate Seal]

J. E. Gardner  
(State title)  
Secretary

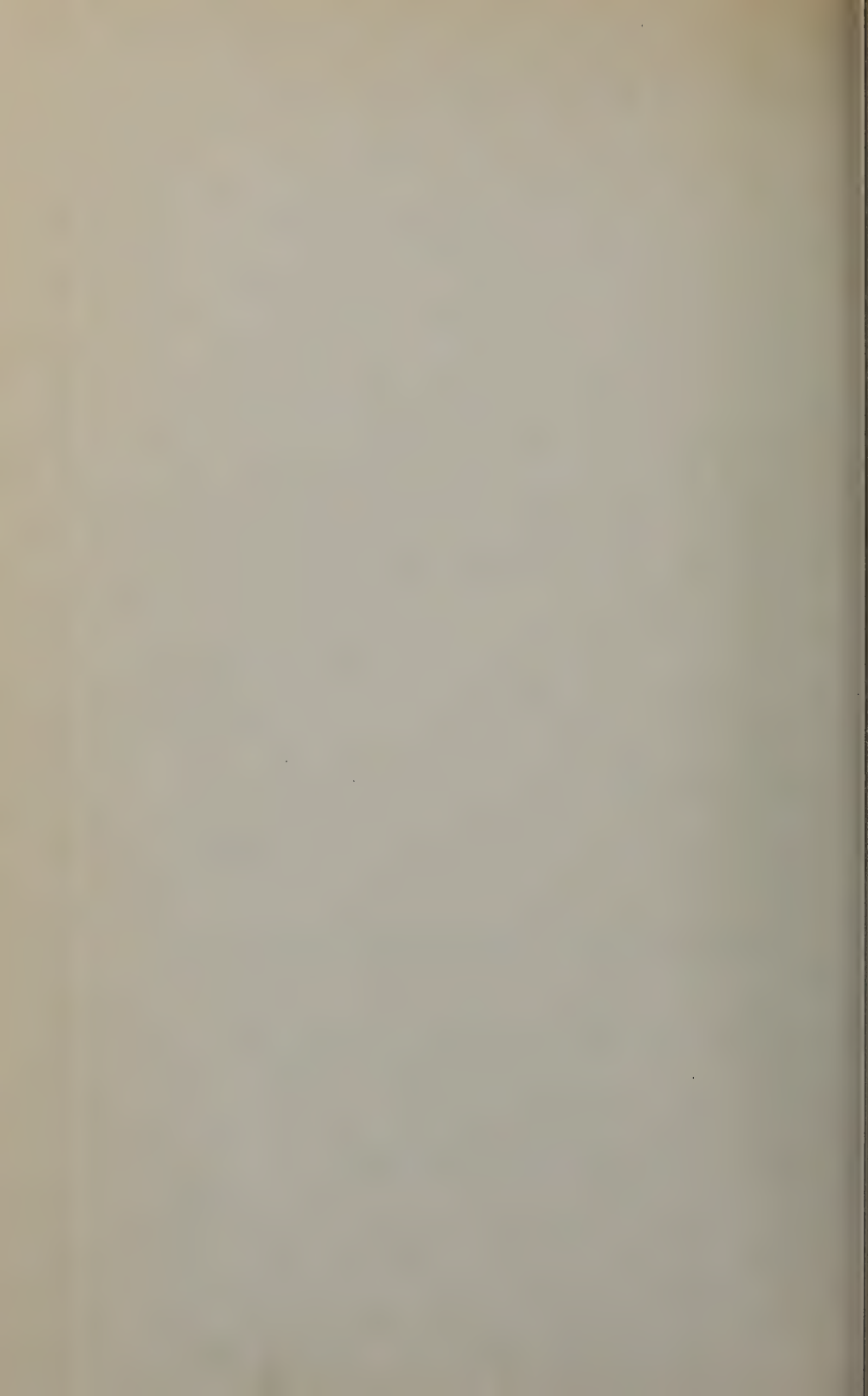
Subscribed and sworn to before me this 15th day of March, 1939.

[Notarial Seal] George Rollnick, Notary Public  
(Signature of officer (Title)  
administering oath)

GEORGE ROLLNICK

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[159]



# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 3)

158

For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

BILDERS CRUSHED ROCK PRODUCTS COMPANY

(Name)

2730 SOUTH ALAMEDA STREET,

(Street and number)

LOS ANGELES, LOS ANGELES, CALIFORNIA.

(Post office)

(County)

(State)

File

Card

212

Serial

No. 856731

District

8 Calif

(Clerk's Stamp)

Cash Checks M. O.

First Payment

Kind of business INACTIVE

## ADJUSTED NET INCOME COMPUTATION

GROSS INCOME			
1. Gross sales (where inventories are an income-determining factor).....	Less returns and allowances.....	\$	\$
2. Less: Goods sold (from Schedule B-1).....			
3. Gross receipts from sales (item 1 minus item 2).....		\$	
4. Gross receipts (where inventories are not an income-determining factor).....		\$	
5. Less: Deductions (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1).....			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2).....			
9. Rents (See Instruction 19).....			
10. Royalties (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....	Expenses assumed by parent company and		
13. Other income (state nature of income).....	credited by it to Builders Crushed		
14. Total income in items 3, and 6 to 13, inclusive. Book Products Company		\$	6,390.81
DEDUCTIONS			
15. Compensation of officers (from Schedule F).....		\$	
16. Salaries and wages (not deducted elsewhere).....			
17. Rent (See Instruction 23).....			936.11
18. Repairs (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest (See Instruction 26).....			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			
24. Depreciation (from Schedule J).....			4,204.70
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....			
26. Other deductions authorized by law (from Schedule K).....			1,250.00
27. Total deductions in items 15 to 26, inclusive.....			6,390.81
28. Net income for excess-profits tax computation (item 14 minus item 27).....		\$	NONE
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....		\$	NONE

## EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$		
35. 10 percent of item 34.....	\$		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....			
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$ NONE		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....		6%	\$
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....		12%	\$
40. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3).....			\$ NONE

## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (item 32, above).....	\$ NONE		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....	\$		
43. Balance subject to income tax (item 41 minus item 42).....	\$		
44. Portion of item 43 (not in excess of \$5,000); and tax at 12½ percent.....	\$	12½%	\$
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%.....		14%	\$
46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent.....		16%	\$
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$ NONE
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36).....			
49. Balance of income tax (item 47 minus item 48).....			\$
50. Excess-profits tax (item 40, above).....			\$
51. Total tax due (item 49 plus item 50).....			\$ NONE

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (it will be assessed if duplicate copy is not filed).

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Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
- (a) .....
- (b) .....
- (c) .....
- (d) .....
12. Other unallowable deductions:
- (a) .....
- (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
- (a) .....
- (b) .....
14. Sundry debits to earned surplus (itemize):
- (a) .....
- (b) .....
- (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 74,829.62
- 
16. Total of lines 1 to 15..... \$74,829.62
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$74,829.62

18. Adjusted net income (item 32, page 1).....

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.. ..

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

---

23. Total of lines 17 to 22..... \$74,829.62

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Schedule J.—Depreciation. (See Instruction 30)

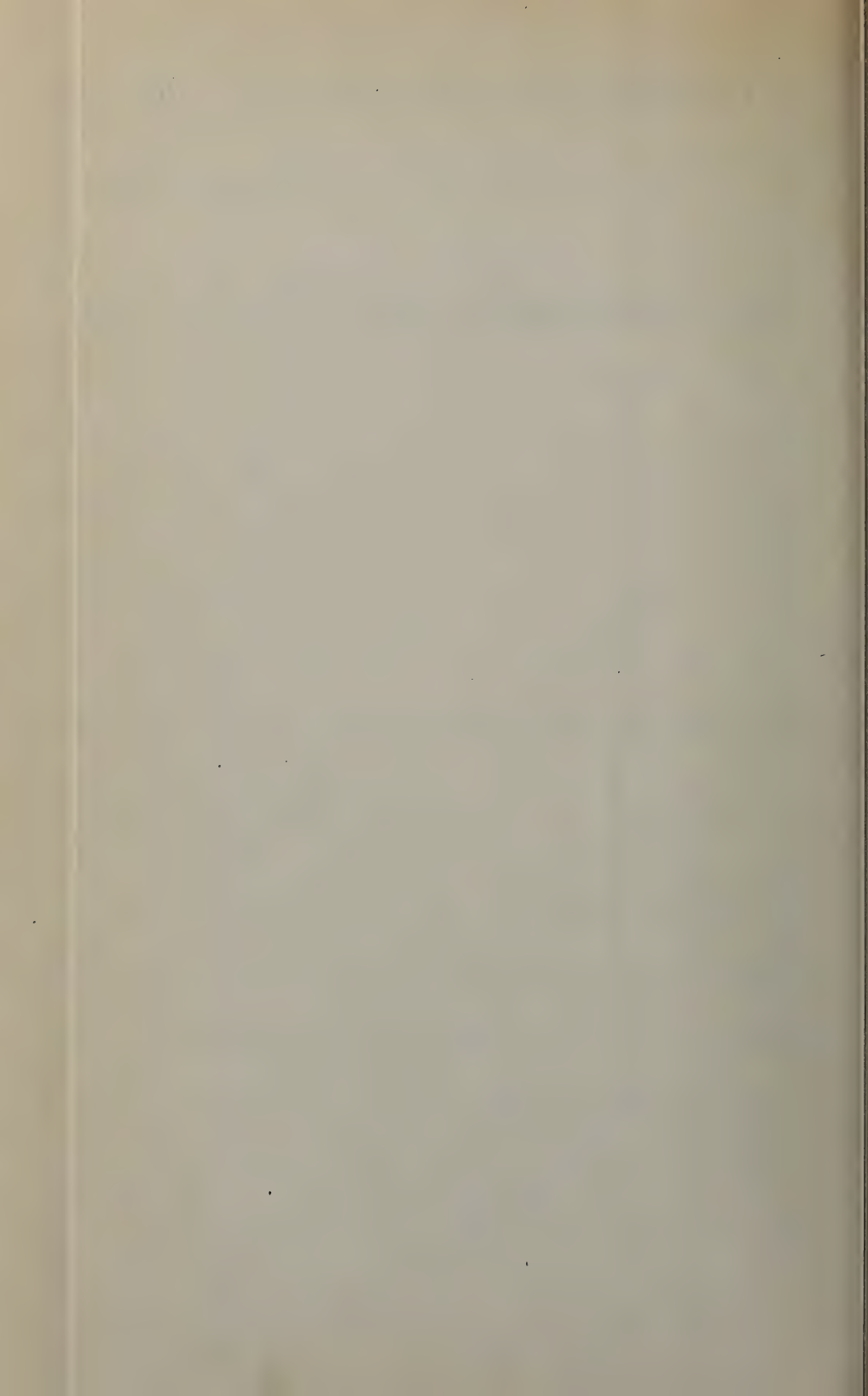
1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
		\$.....	\$.....	\$.....	\$.....			\$.....

SCHEDULE ATTACHED

Total. (Enter as item 24, page 1).....\$.....

Schedule K.—Other Deductions (See Instruction 32)

Amortization of leasehold—schedule attached.



	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
<b>ASSETS</b>				
1. Cash				
2. Notes and accounts receivable	136,157 38	136,157 38	134,730 97	134,730 97
Less reserve for bad debts				
3. Inventories:				
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (items)				
6. Capital assets:				
(a) Depreciable assets (items):				
Leasehold	25,000 00	25,000 00	25,000 00	25,000 00
Machinery and equipment	209,307 47	209,307 47	211,544 97	211,544 97
Furniture and fixtures	1,110 00	1,110 00	1,110 00	1,110 00
Total depreciable assets	235,417 47	235,417 47	237,654 97	237,654 97
Less reserve for depreciation	228,261 13	7,156 34	229,838 41	7,816 56
(b) Depletable assets				
Less reserve for depletion				
(c) Land				
7. Other assets (items)				
8. Total Assets		143,313 72		142,549 83
<b>LIABILITIES</b>				
9. Accounts payable				
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year				
(b) With original maturity of 1 year or more				
11. Accrued expenses (items):				
Rent	1,033 34	1,033 34	269 45	269 45
12. Other liabilities (items)				
13. Surplus reserves (items)				
14. Capital stock:				
(a) Preferred stock				
(b) Common stock		197,200 00		197,200 00
15. Paid-in or capital surplus		19,910 00		19,910 00
16. Earned surplus and undivided profits		74,829 62		74,829 62
17. Total Liabilities		143,313 72		142,549 83

### QUESTIONS

- Business classification. (See Instruction 14) Inactive
- If engaged in more than one of the business classifications indicated in Instruction 16, state on the two lines above the two business accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
- Date of incorporation Sept. 14, 1923
- State or country California
- State collector's office where your return for the preceding year was filed Los Angeles
- The corporation's books are in the care of Open Mated Rook Products Co.
- Located at 2730 So. Alameda Street, Los Angeles.
- Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? No If so, an additional return on Form 1120-H must be filed.
- Is this a consolidated return of railroad corporations? No If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
- If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? No If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
- Was the income of this corporation included in a consolidated return for any prior year? No If so, give name and address of corporation which filed the consolidated return and the last year for

which such return was filed

- Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes," give name and address of each predecessor business and the date of the change in entity
- Upon such change, were any asset values increased or decreased? No If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
- Is this return made on the basis of cash receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income
- State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock
- Did the corporation make a return of information on Forms 1090 and 1099 (see Instruction 10-(1)) for the calendar year 1938? No If the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No (If answer is "yes," attach schedule as required by Instruction 13-(2).)

### AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this 21st day of MARCH, 1939.

George Rollnick NOTARY PUBLIC  
(Signature of notary public)  
OBC. ROLLNICK

### AFFIDAVIT. (See Instruction 7)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 21st day of MARCH, 1939.

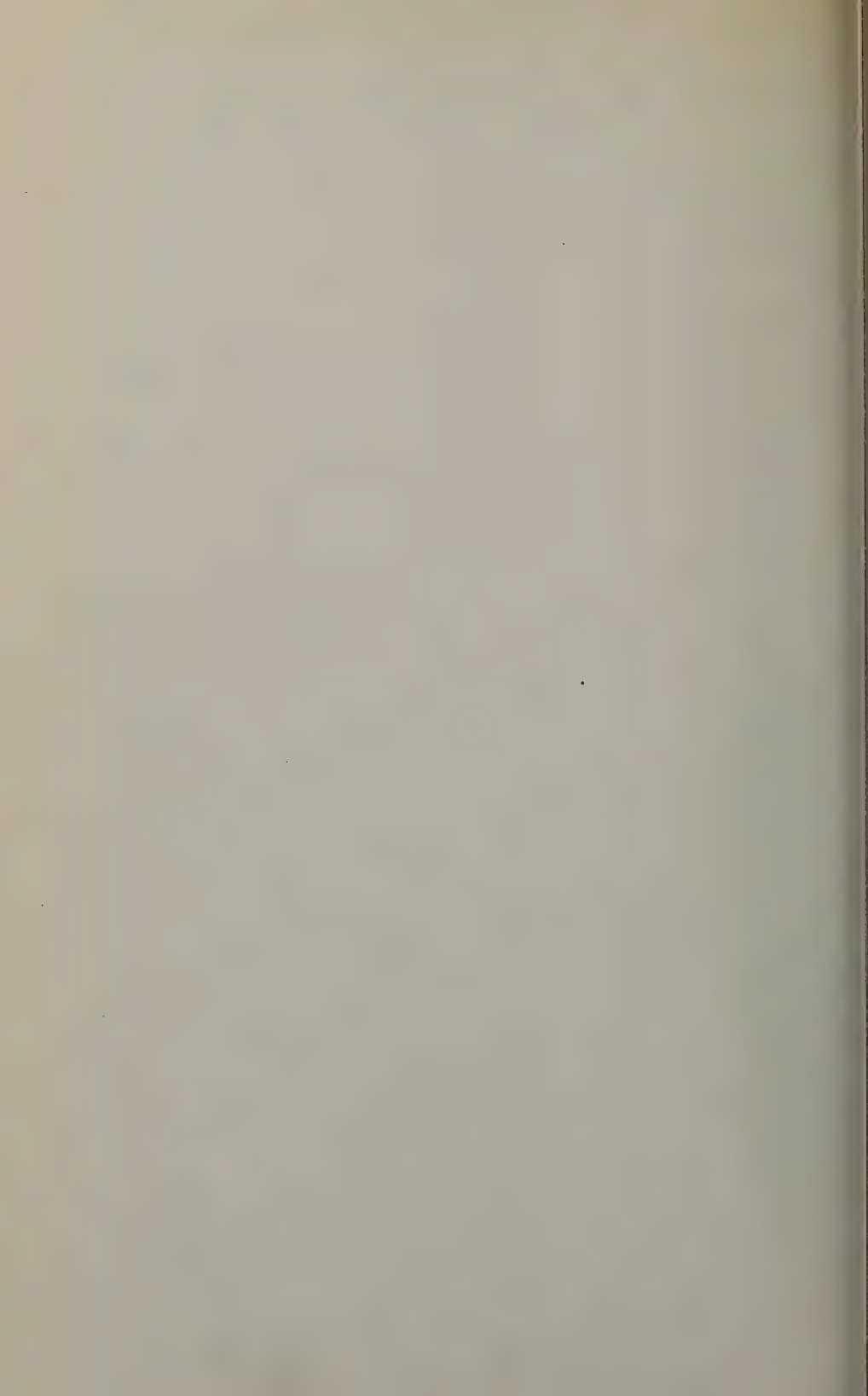
George Rollnick (Signature of officer administering oath)  
OBC. ROLLNICK

(Type)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or company, if any)





BUILDERS CRUSHED ROCK PRODUCTS  
COMPANY

(A California Corporation)

Account Receivable – Parent Company

Analysis of Changes During the Calendar Year 1938

Balance – December 31, 1937	\$136,157.38
Balance – December 31, 1938	134,730.97
	<hr/>
Net Change	\$ 1,426.41
	<hr/> <hr/>

ANALYSIS OF CHANGE

Charges:

Rent Accrued	\$ 936.11	
Depreciation	4,204.70	
Lease amortization of leasehold	1,250.00	
	<hr/>	
	\$6,390.81	
Less depreciation not charged on books	3,879.72	\$ 2,511.09
	<hr/>	

Credits:

Additions to property	\$2,237.50	
Rentals paid	1,700.00	3,937.50
	<hr/>	<hr/>
Net Credit		\$ 1,426.41
		<hr/> <hr/>

## ITEM 26 – AMORTIZATION OF LEASEHOLD

Lessor	Period of Lease		Considera- tion	1938 Amorti- zation
	From	To		
I. S. Metzler	9-22-23	9-22-43	\$25,000.00	\$1,250.00

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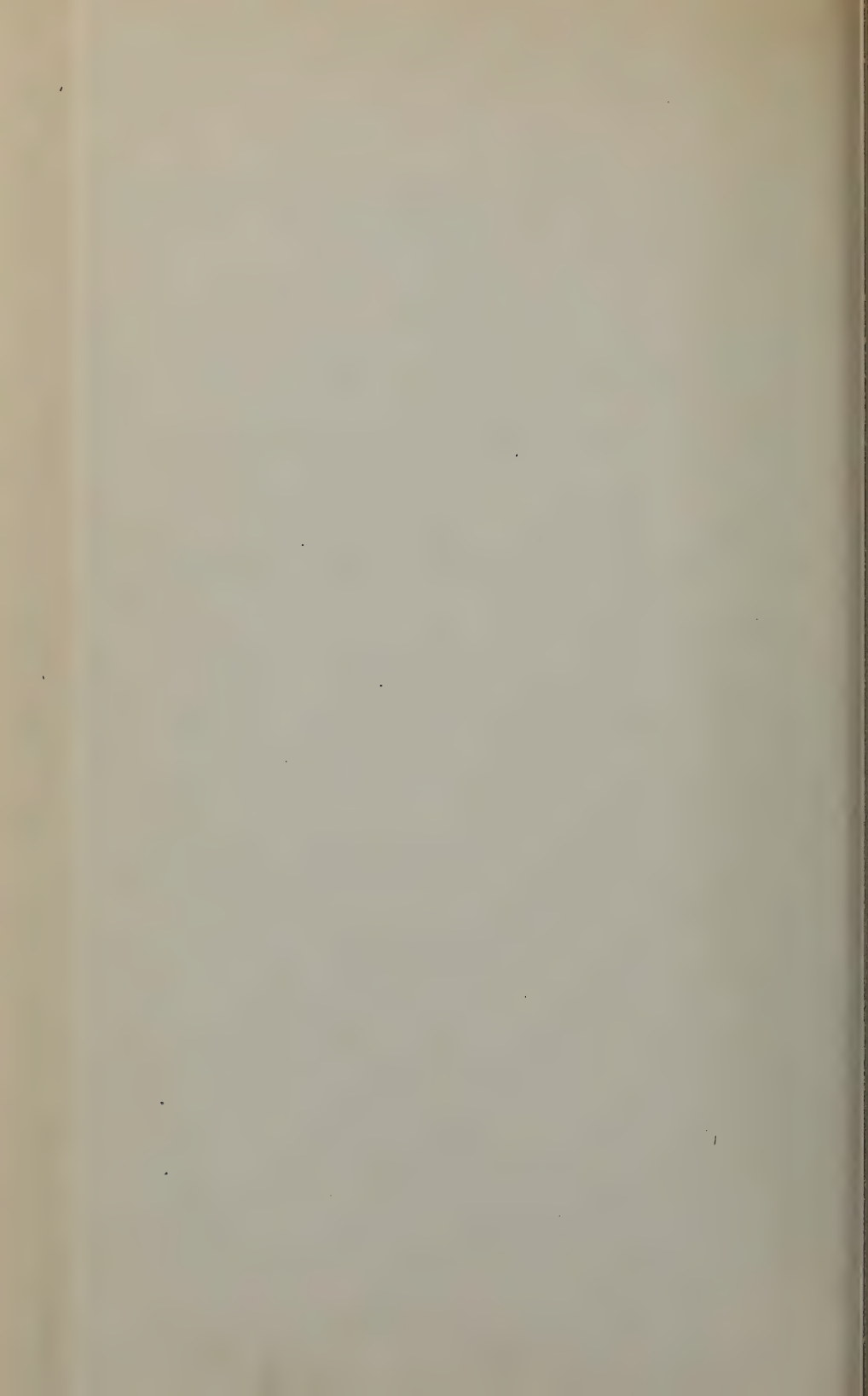
BUILDERS CRUSHED ROCK PRODUCTS COMPANY  
(A California Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938.

Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Rock and Sand Plant	\$194,544.69		\$194,544.69	\$186,785.25		\$186,785.25	\$7,759.44	2	\$3,879.72	\$3,879.72	\$194,544.69	\$190,664.97
Automotive equipment	\$ 14,762.78		\$ 14,762.78	\$ 14,762.78		\$ 14,762.78	-0-	0	-	-		
Additions - 1938							\$2,237.50	2	\$ 324.98	\$1,912.52		
	\$ 14,762.78		\$ 14,762.78	\$ 14,762.78		\$ 14,762.78	\$2,237.50		\$ 324.98	\$1,912.52	\$ 17,000.28	\$ 15,087.76
Office Furniture and equipment	\$ 1,110.00		\$ 1,110.00	\$ 1,110.00		\$ 1,110.00					\$ 1,110.00	\$ 1,110.00
TOTAL - ALL PROPERTY	\$210,417.47		\$210,417.47	\$202,658.03		\$202,658.03	\$9,996.94		\$4,204.70	\$5,792.24	\$212,654.97	\$206,862.73

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess of deficiency of credits to depreciation reserve as per books, over or under depreciation claimed as income tax deduction:

Year 1934, 1935, 1936 and 1937, per previous schedules		\$7,759.44	\$ 7,759.44
Year 1938 - per books	\$ 324.98		
Year 1938 - as per schedule above	4,204.70	3,879.72	\$ 3,879.72
TOTALS		\$1,912.52	\$22,654.97
Add Leasehold		5,906.34	25,000.00
TOTALS as per balance sheet at December 31, 1938		\$7,818.86	\$229,836.11





T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T  
INTERNAL REVENUE SERVICE

Los Angeles, Calif.

Office of the Collector  
Sixth District of California  
In replying refer to - IT:LAL

March 9, 1939

Builders Crushed Rock Products Co.  
2730 South Alameda Street,  
Los Angeles, Calif.  
(Corp.)

Sir:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)  
COLLECTOR.

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# 1938 UNITED STATES CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

(Taxpayer's Name)

## For Calendar Year 1938

or Fiscal Year beginning....., 1938, and ended....., 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

CONSUMERS ROCK &amp; GRAVEL COMPANY, Inc.

(A Delaware Corporation)

2730 South Alameda Street

(Street and number)

Los Angeles, Los Angeles, California.

(Post office)

(County)

(State)

Kind of business Inactive

File  
CodeSerial  
No.

District

(Taxpayer's Name)

RECEIVED

5-15-1939

REV.

LOS ANGELES CAL.

Cash Checks M. O.

First Payment

### ADJUSTED NET INCOME COMPUTATION

Item No.	GROSS INCOME		
1. Gross sales (where inventories are an income-determining factor).....	Less returns and allowances.....	\$	
2. Less cost of goods sold (from Schedule B-1).....		\$	
3. Gross profit from sales (item 1 minus item 2).....		\$	
4. Gross receipts (where inventories are not an income-determining factor).....		\$	
5. Less cost of operations (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1).....			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2)).....			
9. Rents. (See Instruction 19).....			
10. Royalties. (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....			
13. Other income (state nature of income).....			
14. Total income in Items 3, and 6 to 13, inclusive.....		\$	
DEDUCTIONS			
15. Compensation of officers (from Schedule F).....		\$	
16. Salaries and wages (not deducted elsewhere).....			
17. Rent. (See Instruction 23).....			
18. Repairs. (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest. (See Instruction 26).....			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 26).....			
24. Depreciation (from Schedule J).....			
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....			
26. Other deductions authorized by law (from Schedule K).....			
27. Total deductions in items 15 to 26, inclusive.....			
28. Net income for excess-profits tax computation (item 14 minus item 27).....		\$	NONE
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....		\$	NONE

### EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1939 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$		
35. 10 percent of item 34.....	\$		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 27, above).....			
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....	\$	6%	\$
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....	\$	12%	\$
40. Total excess-profits tax (total of item 38, col. 2, and item 39, col. 3).....			\$ NONE

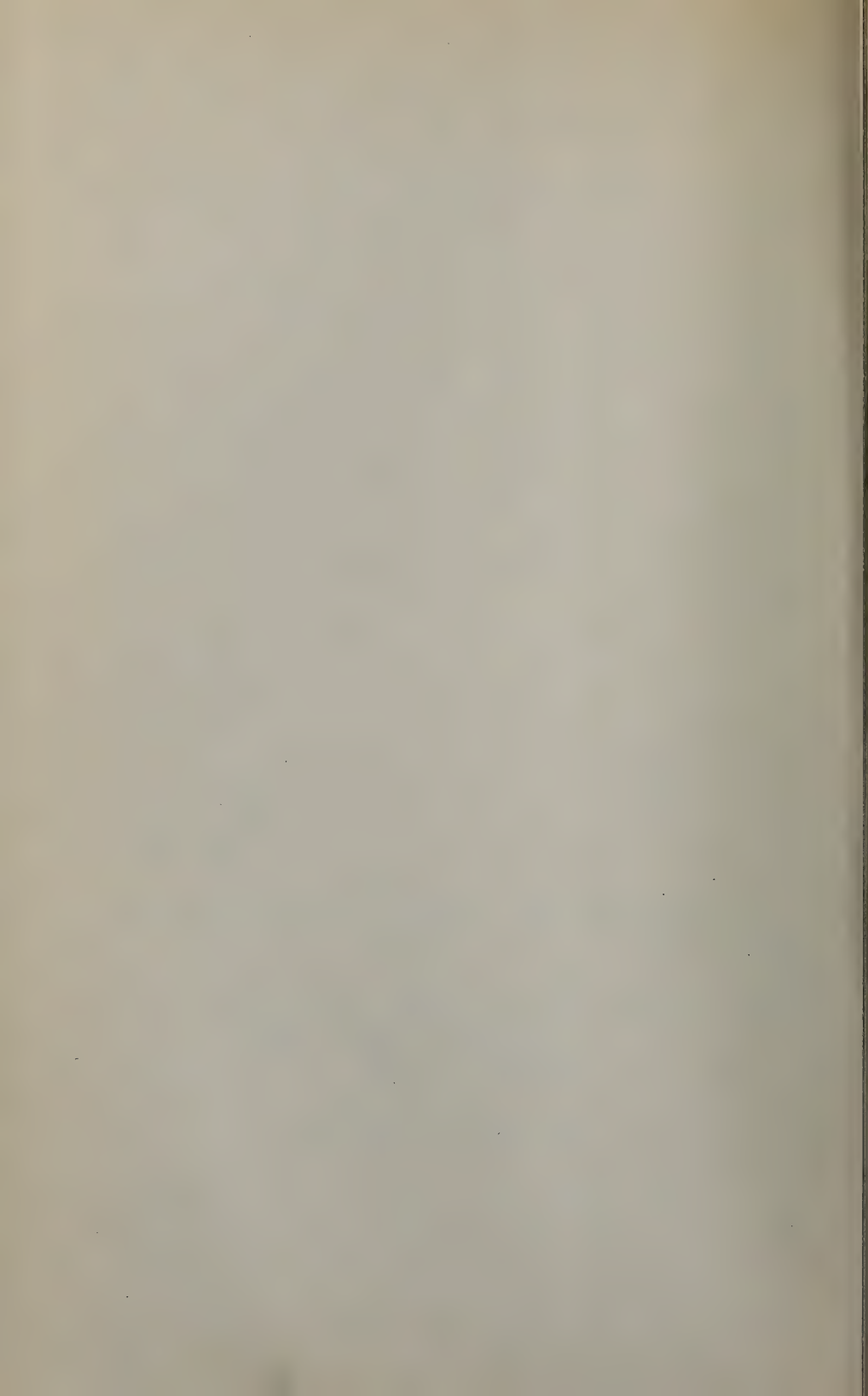
### INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 36)			
41. Adjusted net income (item 32, above).....	\$ NONE		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....	\$		
43. Balance subject to income tax (item 41 minus item 42).....	\$		
44. Portion of item 43 (not in excess of \$4,000); and tax at 12 1/2 percent.....	\$	12 1/2%	\$
45. Portion of item 43 (in excess of \$4,000 and not in excess of \$20,000); and tax at 14 percent.....		14%	\$
46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent.....		16%	\$
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$ NONE
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36).....			\$
49. Balance of income tax (item 47 minus item 48).....			\$ NONE
50. Excess-profits tax (item 40, above).....			\$
51. Total tax due (item 49 plus item 50).....			\$ NONE

NOTE—One form mailed "DUPLICATE COPY" must be filed with this original return (\$10 will be assessed if duplicate copy is not filed).

D-1700

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1938

## CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 7)

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(Auditor's Stamp)

## For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

CONSUMERS ROCK &amp; GRAVEL COMPANY, Inc.

(Name)

530 SOUTH ALAMEDA STREET,

(Street and number)

LOS ANGELES, LOS ANGELES, CALIFORNIA.

(Post office)

(County)

(State)

INACTIVE

Kind of business

File No. 318

Serial No. 866690

E. J. ...

(Auditor's Stamp)

Cash Check M. O.

Paid Payment

## ADJUSTED NET INCOME COMPUTATION

Item No.	GROSS INCOME		
1. Gross sales (where inventories are an income-determining factor)..... \$.....	Less returns and allowances..... \$.....		
2. Less cost of goods sold (from Schedule B-1).....			
3. Gross profit from sales (item 1 minus item 2).....			
4. Gross receipts (where inventories are not an income-determining factor)..... \$.....			
5. Less cost of operations (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-(1)).....			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4)). (See Instruction 18-(2)).....			
9. Rents. (See Instruction 19).....			
10. Royalties. (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....	Expenses assumed by parent company and		
13. Other income (state nature of income) credited by it to Consumers Rock & Gravel Company, Inc.			
14. Total income in items 3, and 6 to 13, inclusive. Consumers Rock & Gravel Company, Inc.			222,249 98
DEDUCTIONS			
15. Compensation of officers (from Schedule F).....			
16. Salaries and wages (not deducted elsewhere).....			
17. Rent. (See Instruction 22).....		39,398	12
18. Repairs. (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest. (See Instruction 26).....		72,030	00
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			
24. Depreciation (from Schedule J).....		99,524	81
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....		7,090	12
26. Other deductions authorized by law (from Schedule K).....		4,206	93
27. Total deductions in items 15 to 26, inclusive.....			222,249 98
28. Net income for excess-profits tax computation (item 14 minus item 27).....			None
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....			None

## EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

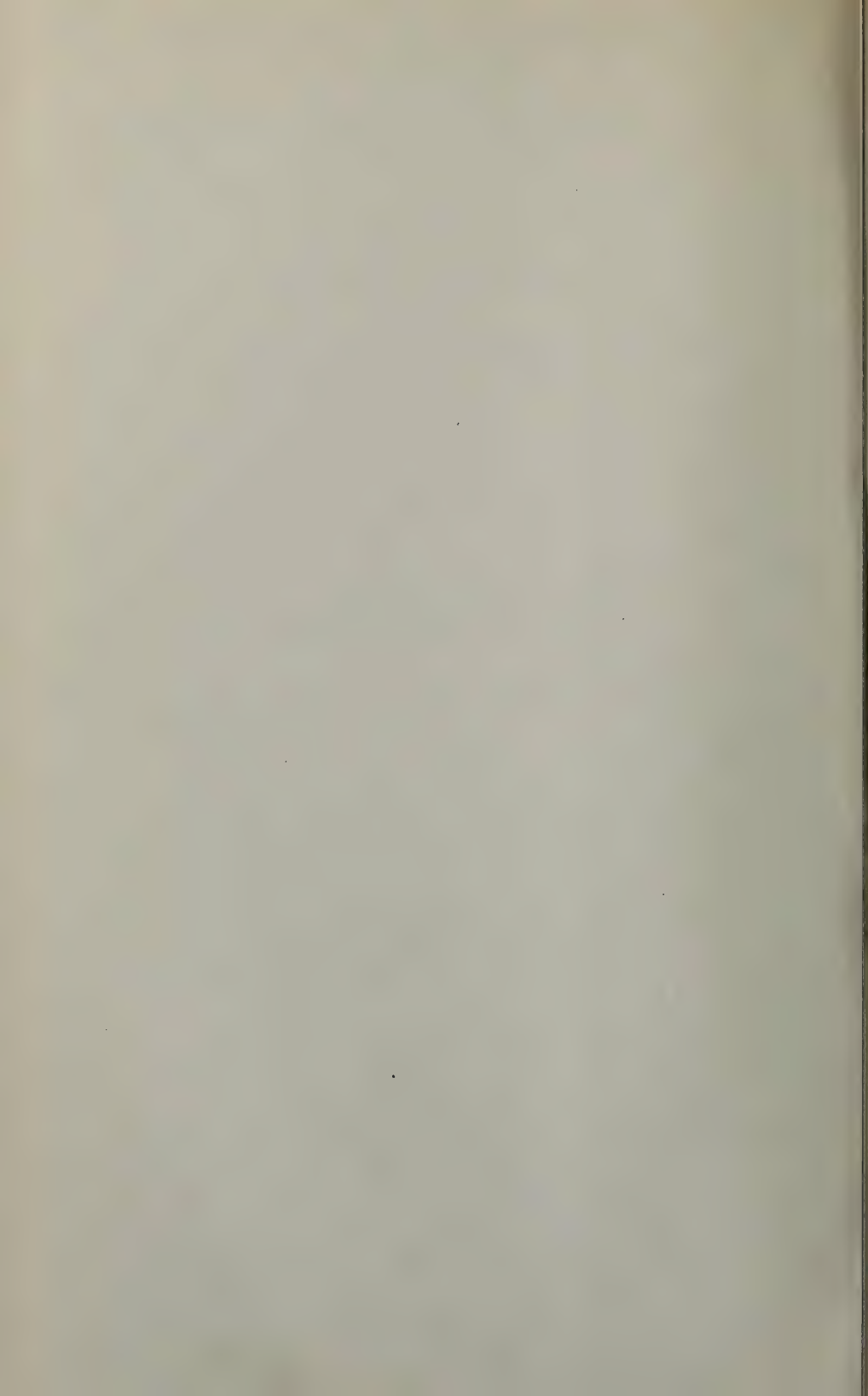
	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	None		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....			
35. 10 percent of item 34.....			
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....			
37. Balance subject to excess-profits tax (item 35 minus total of items 35 and 36).....	None		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....		6%	None
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....		12%	None
40. Total excess-profits tax (total of item 38, col. 2, and item 39, col. 3).....			None

## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (item 32, above).....	None		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....			
43. Balance subject to income tax (item 41 minus item 42).....			
44. Portion of item 43 (not in excess of \$5,000); and tax at 13 1/4 percent.....		13 1/4%	None
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$30,000); and tax at 14%.....		14%	
46. Portion of item 43 (in excess of \$30,000); and tax at 16 percent.....		16%	
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			None
48. Less: Credit for income taxes paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36).....			
49. Balance of income tax (item 47 minus item 48).....			
50. Excess-profits tax (item 40, above).....			
51. Total tax due (item 49 plus item 50).....			None

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (250 will be assessed if duplicate copy is not filed).

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Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
- (a) .....
- (b) .....
- (c) .....
- (d) .....
12. Other unallowable deductions:
- (a) .....
- (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
- (a) .....
- (b) .....
14. Sundry debits to earned surplus (itemize):
- (a) .....
- (b) .....
- (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 530,945.97
- 
16. Total of lines 1 to 15.....\$530,945.97



17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M).....\$522,772.18  
-0-
18. Adjusted net income (item 32, page 1)....
19. Nontaxable and partially exempt income:
- (a) Interest on:
- (1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....
- (2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.. ..
- (3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....
- (4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....
- (5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) Charges to investment.....

(b) account for Pro-rata.....

(c) of subsidiary's earnings..... 8,173.79

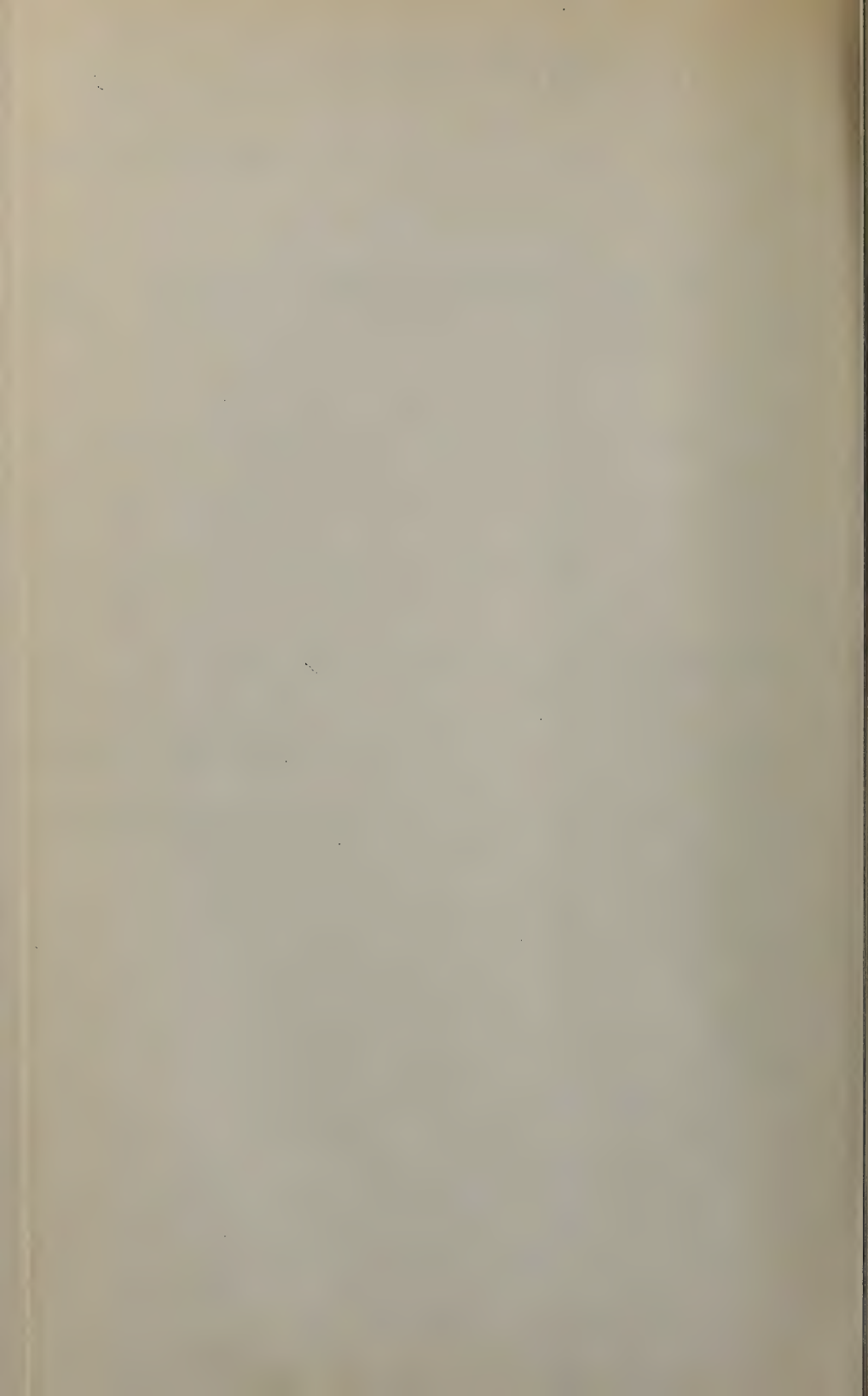
23. Total of lines 17 to 22.....\$530,945.97

Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
		\$.....	\$.....	\$.....	\$.....			\$.....
Total. (Enter as item 24, page 1).....								\$.....

Schedule K.—Other Deductions. (See Instruction 32)

Amortization of bond discount & expense      \$4,206.93





	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
<b>ASSETS</b>				
1. Cash				
2. Notes and accounts receivable <i>Parent Company</i>	\$2,045,512	Q3	\$2,154,820	62
Less reserve for bad debts				
		2,045,512	Q3	2,154,820 62
3. Inventories:				
(a) Raw materials	\$		\$	
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$		\$	
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (itemize) <i>Stocks of subsidiaries</i>	\$	31,932.53	\$	40,106 32
6. Capital assets:				
(a) Depreciable assets (itemize): Buildings	\$ 133,140.52		\$ 133,963.50	
Machinery and equipment	2,451,167.92		2,463,093.36	
Furniture and office equipment	23,562.63		23,555.63	
Total depreciable assets	2,607,871.07		2,620,613.49	
Less reserve for depreciation	2,425,623.92	152,247.15	2,456,502.71	164,110. 78
Depreciable assets	182,247.15		164,110. 78	
Less reserve for depletion	314,965.72	1,006,399.80	322,055.84	999,309. 68
Land	208,763.63			197,358. 85
7. Other assets (itemize): Prepaid rent	\$		\$ 650 00	
Bond sinking funds	11,737 00		14,580 94	
Bond discount and expense	14,172 77	55,909 77	39,965 84	55,196. 78
8. Total Assets		3,530,764.91		3,610,903.03
<b>LIABILITIES</b>				
9. Accounts payable	\$		\$	
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year	\$		\$	
(b) With original maturity of 1 year or more				
11. Accrued expenses (itemize) <i>Interest</i>	\$ 205,120 00		\$ 360,150 00	
Rents	2,481 22	290,601 22	2,415 55	362,565 55
12. Other liabilities (itemize)				
Bonded debt		1,200,500 00		1,200,500 00
13. Surplus reserves (itemize)	\$		\$	
14. Capital stock:				
(a) Preferred stock	\$	1,516,891 51	\$	1,516,891 51
(b) Common stock		504,007 99		504,007 99
15. Paid-in or capital surplus		18,764 19		26,937 98
16. Earned surplus and undivided profits				
17. Total Liabilities		3,530,764.91		3,610,903.03

## QUESTIONS

1. Business classification. (See Instruction 16) *Inactive*

which such return was filed

If engaged in more than one of the business classifications indicated in Instruction 16, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.

2. Date of incorporation *May 6, 1928*3. State or country *Alabama*4. State collector's office where your return for the preceding year was filed *Los Angeles*

5. The corporation's books are in care of consolidated stock products Co.

6. Located at *2730 So. Alameda St., Los Angeles*7. Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? *No*. If so, an additional return on Form 1120 H must be filed.8. Is this a consolidated return of railroad corporations? *No*. If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.

9. If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? *No*. If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.

10. Was the income of this corporation included in a consolidated return for any prior year? *No*. If so, give name and address of corporation which filed the consolidated return and the last year for

10. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business in existence during this or any prior year since December 31, 1917? *No*. If answer is "yes," give name and address of each predecessor business and the date of the change in entity.

11. If such change, were any asset values increased or decreased?

If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.

12. Is the return made on the basis of cash receipts and disbursements? *No*. If not, describe fully what other basis or method was used in computing net income.

13. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. *None*. If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock.

14. Did the corporation make a return of information on Forms 1080 and 1089 (see Instruction 10-(1)) for the calendar year 1938? *No*.

15. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") *No*. (If answer is "yes," attach schedule as required by Instruction 13 (2).)

## AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return, including any accompanying schedules and statements has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this *1st* day of *March*, 1939.

*JOHN HOLLNICK*  
Signature of officer preparing this return

*JOHN HOLLNICK*  
(Title)

*JOHN HOLLNICK*  
(Title)

## AFFIDAVIT. (See Instruction 7)

I, the undersigned, do hereby swear (or affirm) that I have prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I have any knowledge.

Subscribed and sworn to before me this *1st* day of *March*, 1939.

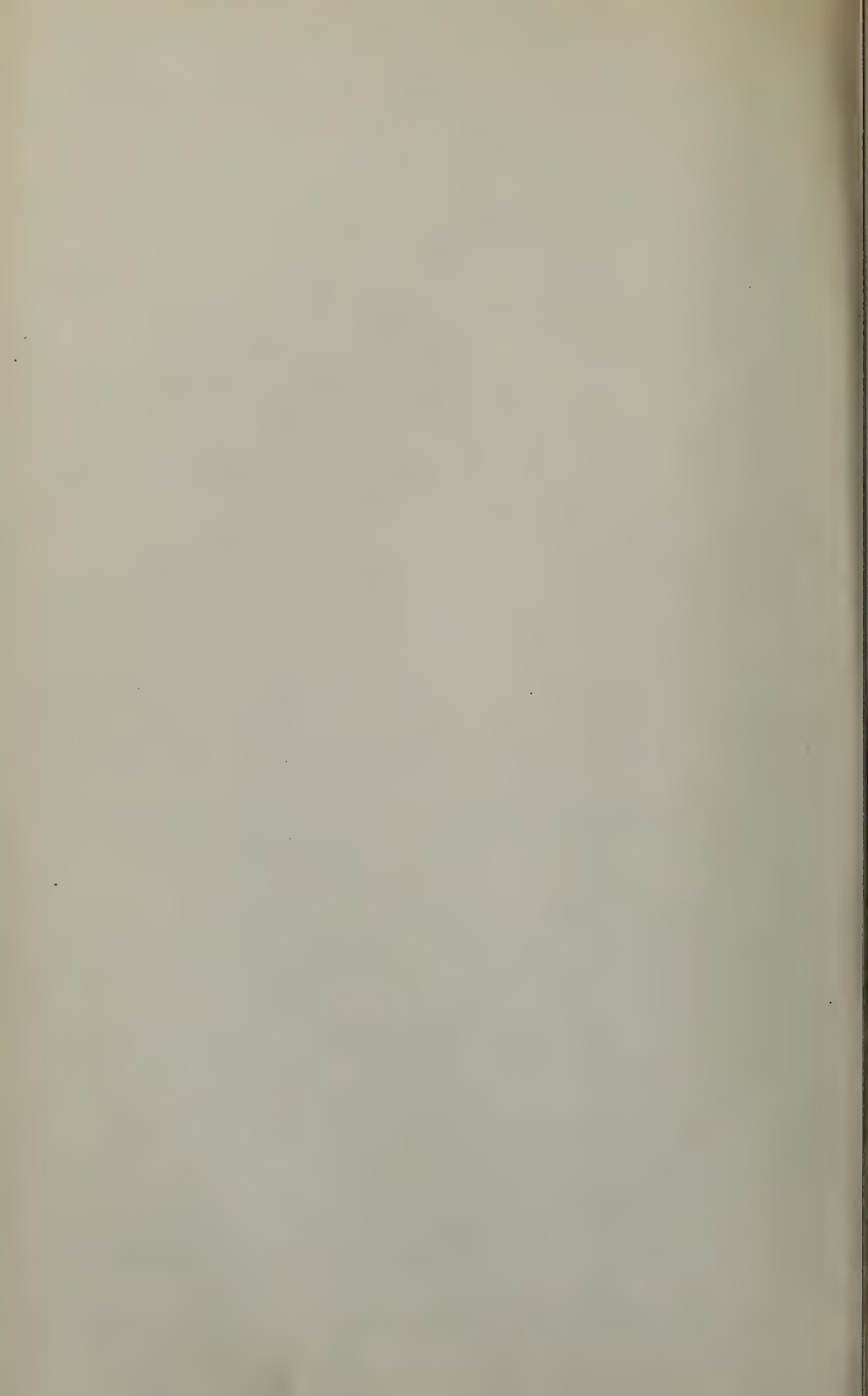
*JOHN HOLLNICK*  
(Signature of officer administering oath)

*JOHN HOLLNICK*  
(Title)

*JOHN HOLLNICK*  
(Signature of person preparing this return)

*JOHN HOLLNICK*  
(Signature of person preparing this return)

(Name of firm or employee, if any)



CONSUMERS ROCK & GRAVEL COMPANY, INC.,  
(A Delaware Corporation)

Accounts Receivable – Parent Company

Analysis of Changes During the Calendar Year 1938

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This account has been kept in accordance with the terms of an operating agreement with the parent company, dated April 1, 1929.

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Balance per books – December 31, 1938 \$2,154,820.62

Balance per books – December 31, 1937 2,045,512.03

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Net change during 1938 \$ 109,308.59

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ANALYSIS OF NET CHANGE:

CHARGES:

Expenses assumed by parent company:

Rent \$ 39,398.12

Interest 72,030.00

Amortization of bond  
discount & expense 4,206.93

Depreciation 99,524.81

Depletion 7,090.12

---

\$222,249.98

Excess of depreciation claimed for 1938 over depreciation provision as per books	50,544.81
---	-----------

Credits to prop- erty ac- counts	\$30,925.17
--	-------------

Less: Accrued		
Depreciation	18,101.21	12,823.96
	<hr/>	<hr/>
		\$184,529.13

## CREDITS:

Paid to sinking fund	\$ 2,843.94
-------------------------	-------------

Additions to property	32,262.81
--------------------------	-----------

Rentals paid	40,113.79	75,220.54
	<hr/>	<hr/>

## Net Change

During 1938	\$109,308.59
	=====



CONSUMERS ROCK & GRAVEL COMPANY, Inc.,  
(A Delaware Corporation)

Item 25 - Depletion of Rock Deposits for the Calendar  
Year 1938

Name of Property	Value Per Books	Depletion Prior Years	Depletion Year 1937	Total Depletion
Alameda	\$ 129,725.80	\$120,000.00		\$120,000.00
Hewitt	48,011.38	10,998.51		10,998.51
Irwindale	866,886.18	77,987.58	\$7,090.12	85,077.70
Penrose	64,886.63	10,371.65		10,371.65
Sheldon	6,927.45			
Sycamore	204,928.08	74,169.71		74,169.71
	<u>\$1,321,365.52</u>	<u>\$286,005.55</u>	<u>\$7,090.12</u>	<u>\$293,527.45</u>
Add: Reserve for refilling		21,438.27		21,438.27
Per balance sheet December 31, 1938	<u>\$1,321,365.52</u>	<u>\$314,965.72</u>	<u>\$7,090.12</u>	<u>\$322,055.84</u>

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CONSUMERS ROCK & GRAVEL COMPANY, Inc.,  
(a Delaware Corporation)

Stock Owned in Other Corporations as at December 31,  
1938

Name of Company	Address	Percent of Stock Owned	Year Stock Acquired	Tax Return Filed at
Atlas Mixed Mortar Co.	2730 So. Alameda St.	50.25%	1928	Los Angeles
Saticoy Rock Company	Ventura, California	50.72	1927	Los Angeles
Bernal Marl Fertilizer Co.	2730 So. Alameda St.	100.00	1924	Los Angeles

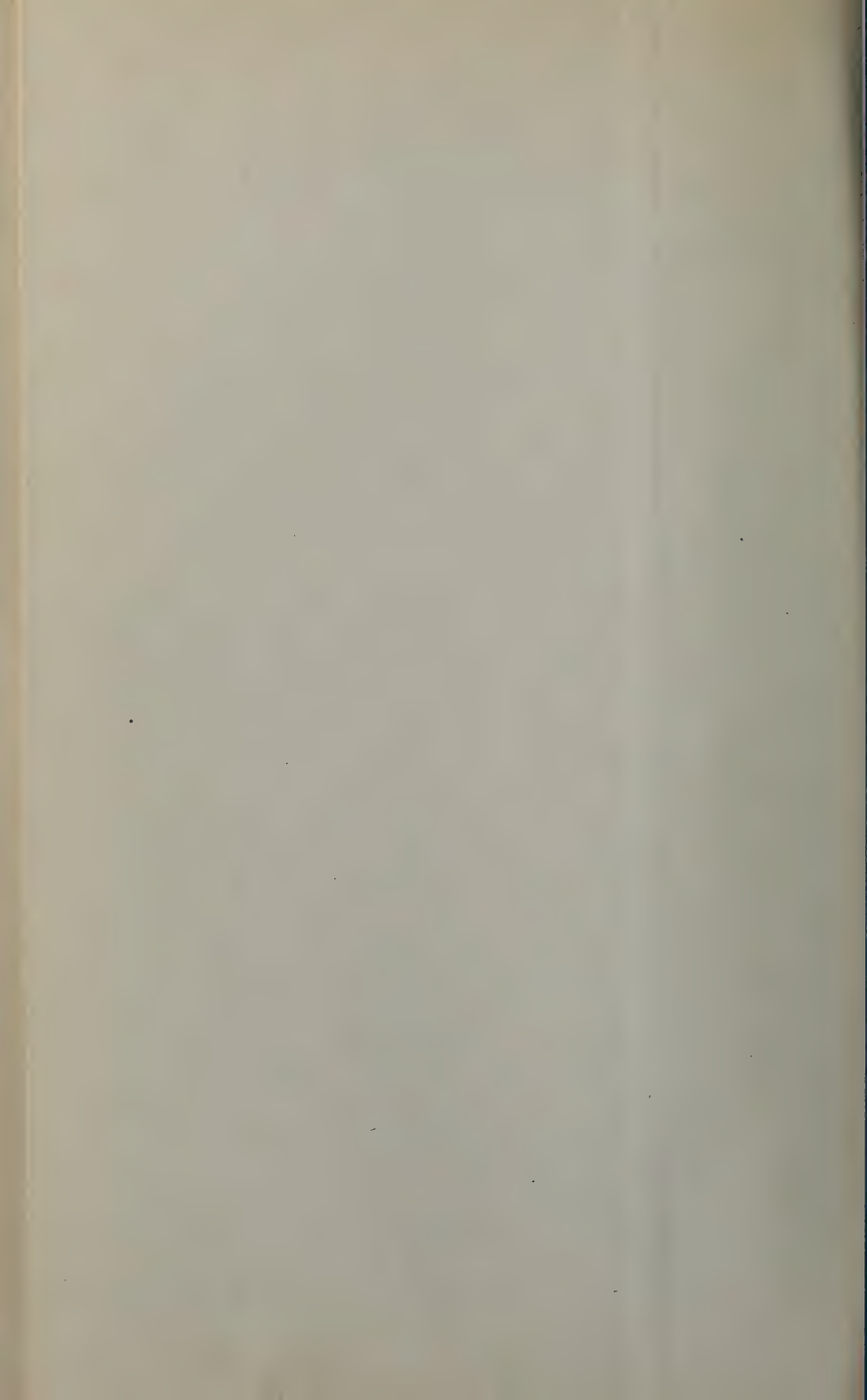
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CONSUMERS ROCK & GRAVEL COMPANY, Inc.  
(A Delaware Corporation)  
Item 24 (Schedule J) Computation of Depreciation for the Year 1938

Particulars	Original Cost & additions, Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Add. During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<b>Bunkers:</b>												
Alameda R. M.	\$ 3,756.23		\$ 3,756.23	\$ 3,120.66		\$ 3,120.66	\$ 635.57	1	\$ 635.57	-0-	\$ 3,756.23	\$ 3,756.23
Big "T" R. M.	\$ 996.45		\$ 996.45	\$ 823.72		\$ 823.72	172.73	1	\$ 172.73	-0-	\$ 996.45	\$ 996.45
Roscoe R. M.	\$ 430.27		\$ 430.27	\$ 50.20		\$ 50.20	\$ 380.07	9	\$ 43.03	\$ 337.04	\$ 430.27	\$ 93.23
Whittier	\$ 24,078.37		\$ 24,078.37	\$ 21,643.60		\$ 21,643.60	\$ 2,434.77	1	\$ 2,434.77	-0-	\$ 24,078.37	\$ 24,078.37
Whittier R. M.	\$ 1,264.66		\$ 1,264.66	\$ 632.31		\$ 632.31	\$ 632.35	38	\$ 180.66	\$ 451.69	\$ 1,264.66	\$ 812.97
Total - All Bunkers	\$ 30,525.98		\$ 30,525.98	\$ 26,270.49		\$ 26,270.49	\$ 4,255.49		\$ 3,466.76	\$ 788.73	\$ 30,525.98	\$ 29,737.25
<b>Buildings:</b>												
Alameda Dispatchers' Office & Drivers Room	\$ 664.84		\$ 664.84	\$ 33.24		\$ 33.24	\$ 631.60	19	\$ 33.24	\$ 598.36	\$ 664.84	\$ 66.48
Alameda B. M. Warehouse	\$ 5,039.58		\$ 5,039.58	\$ 67.19		\$ 67.19	\$ 4,972.39	24	\$ 201.58	\$ 4,770.81	\$ 5,039.58	\$ 268.77
Alameda R. M. Warehouse	\$ 1,256.60		\$ 1,256.60	\$ 109.95		\$ 109.95	\$ 1,146.65	18	\$ 62.83	\$ 1,083.82	\$ 1,256.60	\$ 172.78
Alameda Garage	\$ 1,856.87		\$ 1,856.87	\$ 509.29		\$ 509.29	\$ 1,347.58	16	\$ 83.66	\$ 1,263.92	\$ 1,856.87	\$ 592.95
Alameda Truck Shop Additions	\$ 1,191.93		\$ 1,191.93	\$ 172.26		\$ 172.26	\$ 1,019.67 781.96	16 1/2 16 1/2	\$ 59.60 47.40	\$ 960.07 734.56		
	\$ 1,191.93		\$ 1,191.93	\$ 172.26		\$ 172.26	\$ 1,801.63		\$ 107.00	\$ 1,694.63	\$ 1,973.89	\$ 279.26
Office Building	\$ 35,999.18		\$ 35,999.18	\$ 13,743.17		\$ 13,743.17	\$ 22,256.01	16	\$ 1,391.00	\$ 20,865.01	\$ 35,999.18	\$ 15,134.17
Roscoe Cement Warehouse	\$ 889.80		\$ 889.80	\$ 3.70		\$ 3.70	\$ 886.10	19	\$ 44.49	\$ 841.61	\$ 889.80	\$ 48.19
Roscoe Drivers' Room	\$ 566.91		\$ 566.91	\$ 18.89		\$ 18.89	\$ 548.02	19	\$ 28.35	\$ 519.67	\$ 566.91	\$ 47.24
Montebello Warehouse	\$ 1,698.55		\$ 1,698.55	\$ 775.03		\$ 775.03	\$ 923.52	11	\$ 83.96	\$ 839.56	\$ 1,698.55	\$ 858.99
Whittier Garage	\$ 7,895.91		\$ 7,895.91	\$ 6,558.90		\$ 6,558.90	\$ 1,337.01	11	\$ 121.54	\$ 1,215.47	\$ 7,895.91	\$ 6,680.44
Whittier Office	\$ 8,569.38		\$ 8,569.38	\$ 3,938.74		\$ 3,938.74	\$ 4,630.64	16	\$ 289.42	\$ 4,341.22	\$ 8,569.38	\$ 4,228.16
Whittier Building	\$ 21,177.65		\$ 21,177.65	\$ 9,242.97		\$ 9,242.97	\$ 11,934.68	11	\$ 1,084.97	\$ 10,849.71	\$ 21,177.65	\$ 10,327.94
Valley office & garage	\$ 26,477.62		\$ 26,477.62	\$ 12,712.78		\$ 12,712.78	\$ 13,764.84	11	\$ 1,251.35	\$ 12,513.49	\$ 26,477.62	\$ 13,964.13
Valley Welding Shop	\$ 382.01		\$ 382.01				\$ 382.01	10	\$ 38.20	\$ 343.81	\$ 382.01	\$ 38.20
Whittier Warehouse	\$ 19,514.71		\$ 19,514.71	\$ 9,117.42		\$ 9,117.42	\$ 10,397.29	11	\$ 945.21	\$ 9,452.08	\$ 19,514.71	\$ 10,062.63
TOTAL BUILDINGS	\$ 133,181.54		\$ 133,181.54	\$ 57,003.53		\$ 57,003.53	\$ 76,959.97		\$ 5,766.80	\$ 71,193.17	\$ 133,963.50	\$ 62,770.33

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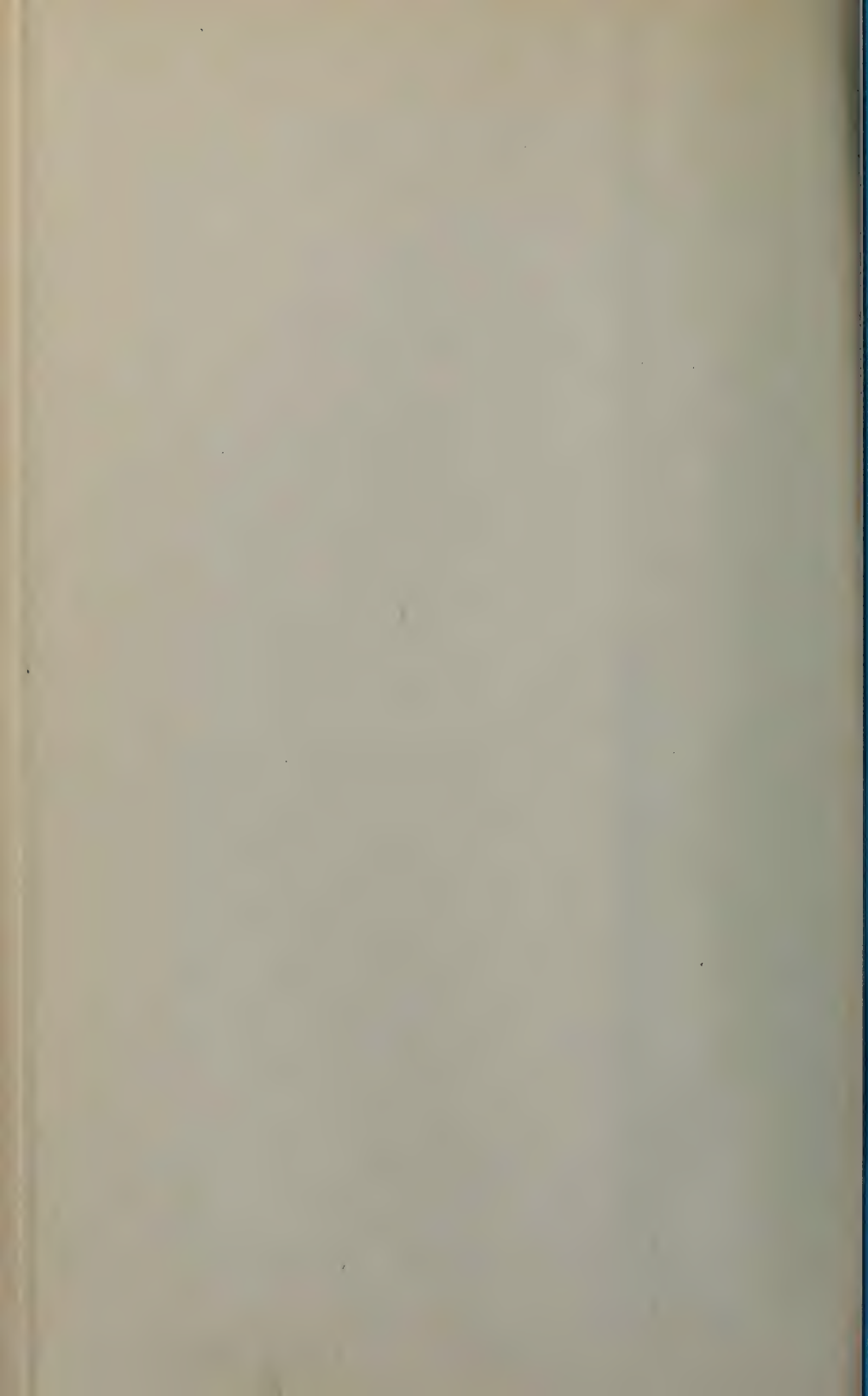




**CONSUMERS ROCK & GRAVEL COMPANY, INC.**  
(A Delaware Corporation)

Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost & Additions, Net of Sales & Retirements to 12-31-37	Sales or Retirements to Year 1938	Balance of Cost 12-31-37	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<b>Rock &amp; Gravel Plants:</b>												
<u>Alameda</u>	\$ 262,520.63		\$ 262,520.63	\$ 245,628.97		\$ 245,628.97	\$ 16,891.66	2	\$ 8,445.83	\$ 8,445.83		
Additions - 1936	898.69		898.69	131.06		131.06	767.63	7	112.34	665.29		
- 1936	2,369.95		2,369.95	513.49		513.49	1,856.46	4	473.99	1,382.47		
- 1937	805.01		805.01	93.91		93.91	711.10	4	161.00	550.10		
- 1937	593.06	\$124.54	468.52	3.28		3.28	465.24	14	31.23	434.01		
- 1937	1,373.85		1,373.85	11.45		11.45	1,362.40	9	137.38	1,225.02		
7-31-38							1,176.82	10	49.03	1,127.79		
12-31-38							533.66	8	-0-	533.66		
	\$ 268,561.10	\$124.54	\$ 268,436.65	\$ 246,382.16		\$ 246,382.16	\$ 23,764.97		\$ 9,410.80	\$ 14,354.17	\$ 270,147.13	\$ 255,792.96
<u>Big "T"</u>	\$ 276,337.01		\$ 276,337.01	\$ 261,166.20		\$ 261,166.20	\$ 15,170.81	1	\$ 15,170.81	-0-	\$ 276,337.01	\$ 276,337.01
<u>Hewitt</u>	\$ 211,830.93		\$ 211,830.93	\$ 211,830.93		\$ 211,830.93	-0-	0	-0-	-0-	\$ 211,830.93	\$ 211,830.93
<u>Irwindale</u>	\$ 503,694.79		\$ 503,694.79	\$ 377,982.57		\$ 377,982.57	\$125,712.22	6	\$ 20,952.03	\$104,760.19		
Additions - 1936	1,720.00		1,720.00	917.32		917.32	802.68	4-2/3	172.00	630.68		
- 1936	206.00		206.00	35.99		35.99	170.01	8	20.60	189.41		
- 1936	891.75		891.75	222.93		222.93	668.82	4	178.35	490.47		
- 1936	6,748.75		6,748.75	1,054.49		1,054.49	5,694.26	7	843.59	4,850.67		
- 1937	4,005.93		4,005.93	417.28		417.28	3,588.65	7	500.74	3,087.91		
- 1937	6,715.50		6,715.50	285.69		285.69	6,429.81	3	1,678.87	4,750.94		
- 1937	250.00		250.00			250.00		20	12.50	237.50		
6-30-38						5,902.54		5	590.25	5,312.29		
12-31-38						323.33		8		323.33		
	\$ 524,232.72		\$ 524,232.72	\$ 380,916.27		\$ 380,916.27	\$149,542.82		\$ 24,948.93	\$124,593.89	\$ 530,459.09	\$ 405,865.20
<u>Penrose</u>	\$ 122,863.24		\$ 122,863.24	\$ 122,863.24		\$ 122,863.24					\$ 122,863.24	\$ 122,863.24
<u>Roseme</u>	\$ 344,651.41		\$ 344,651.41	\$ 312,394.07		\$ 312,394.07	\$ 32,257.34	3	\$ 10,752.45	\$ 21,504.89		
Additions - 1936	6,110.55		6,110.55	1,536.97		1,536.97	4,573.58	4	1,018.32	3,555.26		
- 1936	1,691.37		1,691.37	387.60		387.60	1,303.77	6	211.42	1,092.35		
- 1936	62.18		62.18	7.26		7.26	54.92	8	6.22	48.70		
- 1936	794.39		794.39	104.11		104.11	690.28	10	66.20	624.08		
- 1936	99.46		99.46	8.29		8.29	91.17	18	4.97	86.20		
- 1937	7,639.50		7,639.50	716.21		716.21	6,923.29	7	954.63	5,968.66		
- 1937	2,423.52		2,423.52	121.17		121.17	2,302.35	9	242.35	2,060.00		
- 1937	177.00		177.00	2.95		2.95	174.05	19	8.85	165.20		
- 1937	1,162.58		1,162.58	24.14		24.14	1,138.44	3	290.65	847.79		
- 1937	1,408.84		1,408.84			1,408.84		15	93.92	1,314.92		
6-30-38						4,550.78		8	284.42	4,266.36		
7-31-38						641.40		12	22.27	619.13		
9-30-38						818.01		5	40.90	777.11		
10-31-38						102.70		10	1.71	100.99		
	\$ 366,220.80		\$ 366,220.80	\$ 315,302.77		\$ 315,302.77	\$ 57,030.92		\$ 13,999.28	\$ 43,031.64	\$ 372,333.69	\$ 329,302.05
<u>Sheldon</u>	\$ 219,321.10		\$ 219,321.10	\$ 210,374.95		\$ 210,374.95	\$ 8,946.15	1	\$ 8,946.15	-0-	\$ 219,321.10	\$ 219,321.10
<u>Sycamore</u>	\$ 51,311.11		\$ 51,311.11	\$ 46,728.49		\$ 46,728.49	\$ 4,582.62	1	\$ 4,582.62	-0-	\$ 51,311.11	\$ 51,311.11
<b>Total - All Plants</b>	\$2,040,678.10	\$124.54	\$2,040,553.56	\$1,795,565.01		\$1,795,565.01	\$259,038.29		\$ 77,058.59	\$181,979.70	\$2,054,603.30	\$1,872,623.60
<u>Mortar &amp; Putty Plant</u>												
5-31-38							\$ 2,851.71	10	\$ 166.32	\$ 2,685.39	\$ 2,851.71	\$ 166.32





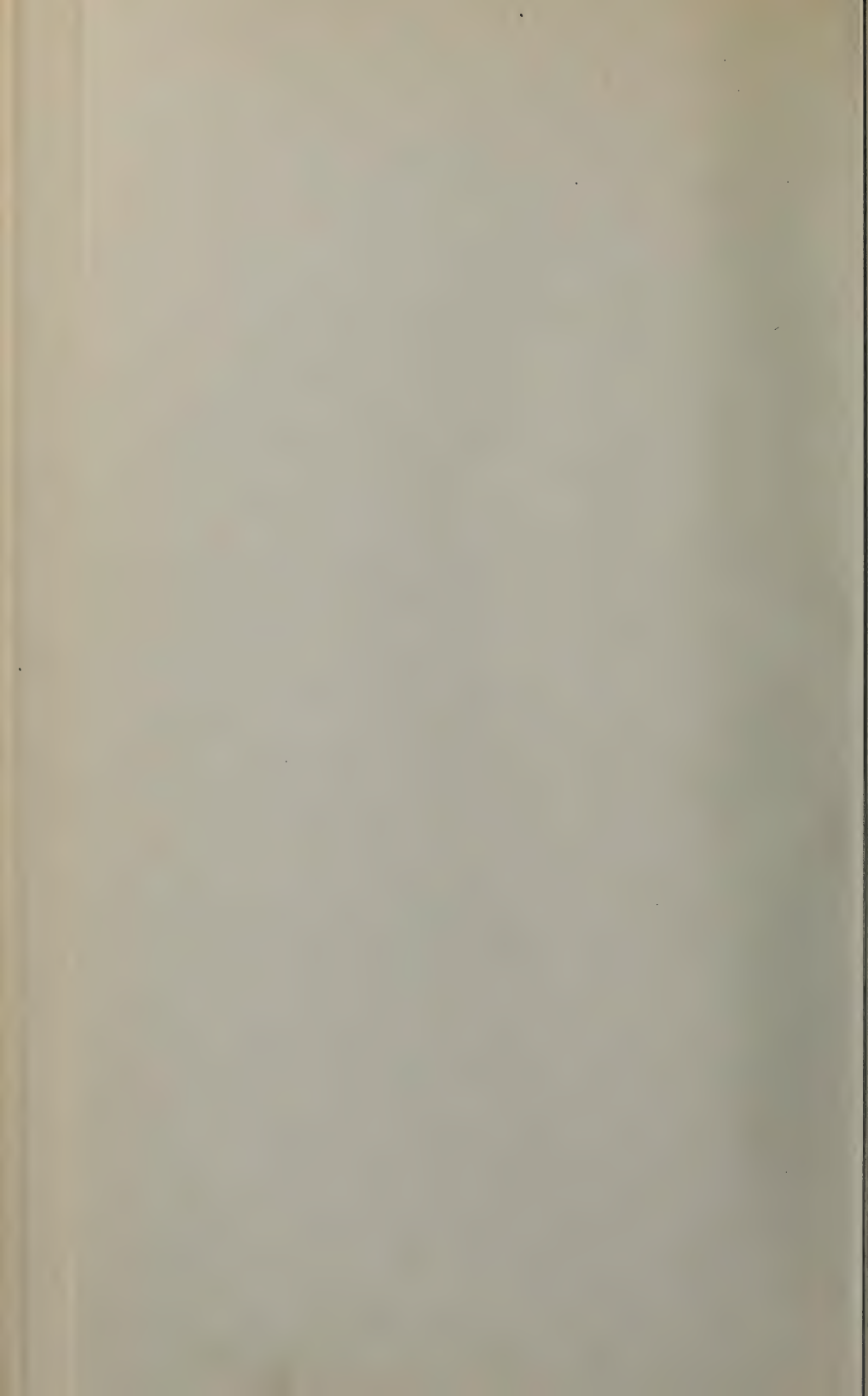
CONSUMERS ROCK & GRAVEL COMPANY, INC.  
( a Delaware Corporation )  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost & Additions, Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining Useful Life at 1-1-38 Additions or at date of During 1938	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<b>Miscellaneous Property:</b>											
Inventory Plant Parts	\$ 3,503.14		\$ 3,503.14				\$ 3,503.14		\$ 3,503.14	\$ 3,503.14	-0-
Grease Pit 6-30-38							\$ 164.60	10	\$ 8.23	\$ 156.37	\$ 8.23
Alameda Road 4-30-38							\$ 600.98	10	\$ 41.04	\$ 559.94	\$ 41.04
Wahoo Railway	\$ 3,090.00		\$ 3,090.00	\$ 2,472.00		\$ 2,472.00	\$ 618.00	1	\$ 618.00	-0-	\$ 3,090.00
Valley Railroad	\$ 62,210.39		\$ 62,210.39	\$ 58,997.51		\$ 58,997.51	\$ 3,212.88	1	\$ 3,212.88	-0-	\$ 62,210.39
Alameda Gas Station Additions- 1937	\$ 2,699.76 157.29		\$ 2,699.76 157.29	\$ 1,854.29		\$ 1,854.29	\$ 805.49 157.29	6 10	\$ 134.24 15.73	\$ 671.23 141.56	
	\$ 2,817.05		\$ 2,817.05	\$ 1,854.29		\$ 1,854.29	\$ 962.76		\$ 119.97	\$ 812.79	\$ 2,004.26
Alameda Wash Rack	\$ 748.90		\$ 748.90	\$ 210.02		\$ 210.02	\$ 538.88	6	\$ 85.78	\$ 453.10	\$ 295.80
Testing equipment	\$ 79.52		\$ 79.52	\$ 63.61		\$ 63.61	\$ 15.91	1	\$ 15.91	-0-	\$ 79.52
Gas pump	\$ 120.00		\$ 120.00	\$ 1.00		\$ 1.00	\$ 119.00	9	\$ 12.00	\$ 107.00	\$ 13.00
Furniture	\$ 23,562.63	\$ 6.00	\$ 23,556.63	\$ 22,587.12		\$ 22,587.12	\$ 969.51	Various	\$ 950.04	\$ 19.47	\$ 23,556.63
Salvage	\$ 2,468.27		\$ 2,468.27				\$ 2,468.27	None		\$ 2,468.27	\$ 2,468.27
Total Miscellaneous Property	\$ 98,599.90	\$ 6.00	\$ 98,593.90	\$ 86,185.55		\$ 86,185.55	\$ 13,173.93		\$ 5,093.85	\$ 8,080.08	\$ 99,359.48
Automotive Equipment Additions	\$ 306,780.57	\$ 18,101.21	\$ 288,679.36	\$ 297,548.84	\$ 18,101.21	\$ 279,447.63	\$ 9,231.73) 10,630.16)	$\frac{1}{2}$ ) $\frac{1}{2}$ )	\$ 7,972.49	\$ 11,889.40	
Total Automotive Equipment -	\$ 306,780.57	\$ 18,101.21	\$ 288,679.36	\$ 297,548.84	\$ 18,101.21	\$ 279,447.63	\$ 19,861.89		\$ 7,972.49	\$ 11,889.40	\$ 299,309.52
TOTAL - ALL PROPERTY	\$2,609,766.09	\$18,231.75	\$2,591,534.34	\$2,262,573.42	\$18,101.21	\$2,244,472.21	\$376,141.28		\$ 99,524.81	\$276,616.47	\$2,620,613.49

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess of credits to depreciation reserve as per books, over depreciation claimed as per schedules attached to tax returns:

For the years 1934, 1935, 1936 and 1937, as per schedules previously submitted	\$163,445.03	\$ 163,445.03
For the year 1938 - per books	\$ 48,980.00	
For the year 1938 - per schedules above	99,524.81	50,544.81
Adjustment in 1936, re: Sale of plant assets	394.53	394.53
Total as per balance sheet of December 31, 1938	\$164,110.78	\$2,620,613.49





T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T  
INTERNAL REVENUE SERVICE  
Los Angeles, Calif.

Office of the Collector  
Sixth District of California  
In replying refer to - IT:LAL

March 9, 1939

Consumers Rock & Gravel Company, Inc.  
(A Delaware Corp.)  
2730 South Alameda Street,  
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)  
COLLECTOR.

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[182]

1938

UNITED STATES  
CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in instruction 2)

(Auditor's Stamp)

## For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

RELIANCE ROCK COMPANY

(Name)

2730 South Alameda Street,

(Street and number)

Los Angeles, Los Angeles, California.

(Post office)

(County)

(State)

Kind of business

Inactive

File

Code

Serial

No.

Entered

(Auditor's Stamp)

RECEIVED

3-15-39

LOS ANGELES CAL.

Cash

Check

M. O.

## ADJUSTED NET INCOME COMPUTATION

Item No.		GROSS INCOME		
1.	Gross sales (where inventories are an income-determining factor).....	\$.....	Less returns and allowances.....	\$.....
2.	Less cost of goods sold (from Schedule B-1).....			\$.....
3.	Gross profit from sales (item 1 minus item 2).....			\$.....
4.	Gross receipts (where inventories are not an income-determining factor).....	\$.....		
5.	Less cost of operations (from Schedule B-2).....			\$.....
6.	Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			\$.....
7.	Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-(1)).....			\$.....
8.	Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-(2)).....			\$.....
9.	Rents. (See Instruction 19).....			\$.....
10.	Royalties. (See Instruction 20).....			\$.....
11.	(a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			\$.....
	(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			\$.....
12.	Dividends (from Schedule E).....			\$.....
13.	Other income (state nature of income).....			\$.....
14.	Total income in items 3, and 6 to 13, inclusive.....			\$.....
		DEDUCTIONS		
15.	Compensation of officers (from Schedule F).....			\$.....
16.	Salaries and wages (not deducted elsewhere).....			\$.....
17.	Rent. (See Instruction 23).....			\$.....
18.	Repairs. (See Instruction 24).....			\$.....
19.	Bad debts (from Schedule G).....			\$.....
20.	Interest. (See Instruction 26).....			\$.....
21.	Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			\$.....
22.	Contributions or gifts paid (from Schedule I).....			\$.....
23.	Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			\$.....
24.	Depreciation (from Schedule J).....			\$.....
25.	Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....			\$.....
26.	Other deductions authorized by law (from Schedule K).....			\$.....
27.	Total deductions in items 15 to 26, inclusive.....			\$.....
28.	Net income for excess-profits tax computation (item 14 minus item 27).....			\$ NONE
29.	Less: Federal excess-profits tax. (See Instruction 33).....			\$.....
30.	Net income (item 28 minus item 29).....			\$.....
31.	Less: Interest on obligations of the United States (item 8, above).....			\$.....
32.	Adjusted net income (item 30 minus item 31).....			\$ NONE

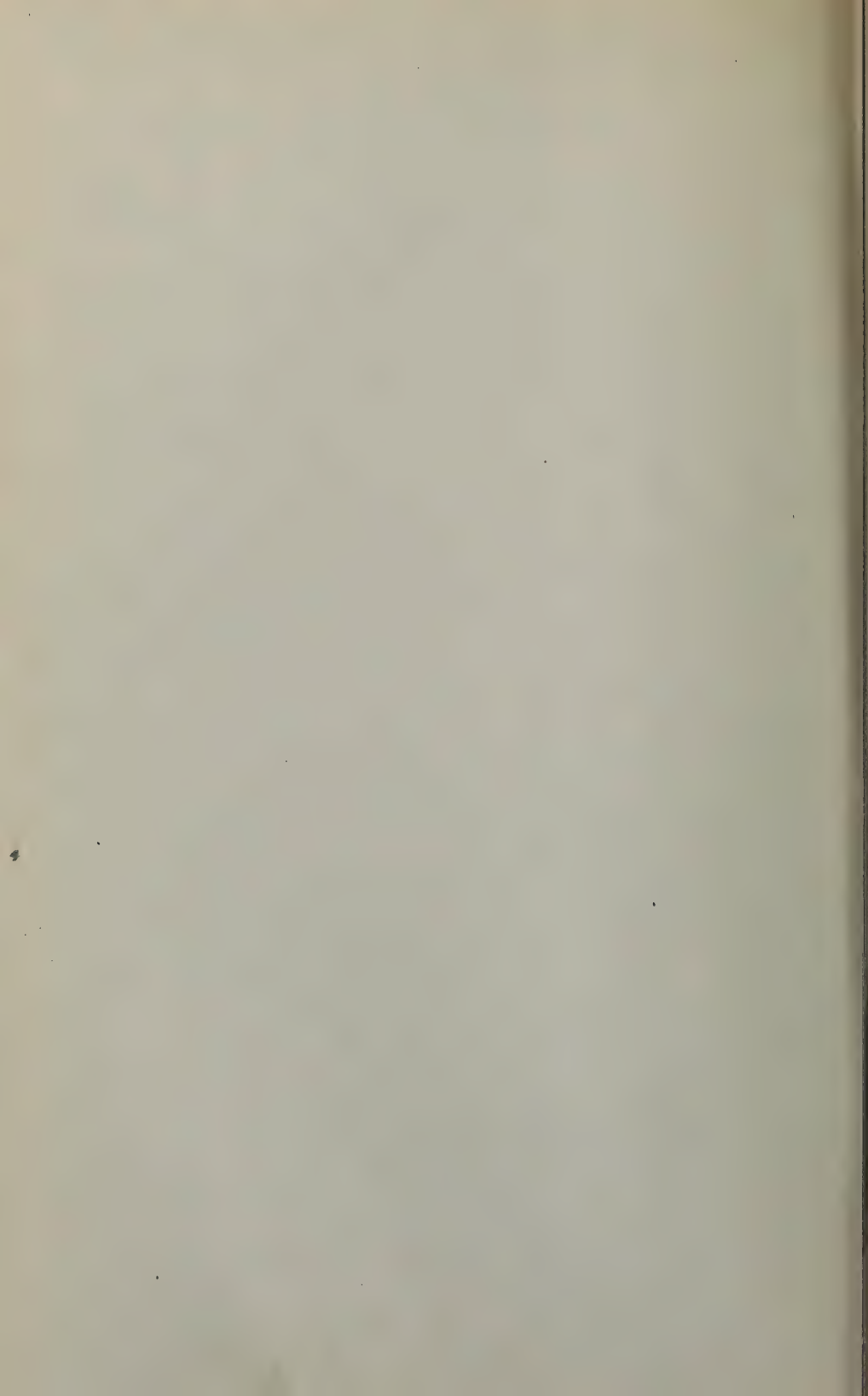
## EXCESS-PROFITS TAX COMPUTATION. (See instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1933 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$.....		
35. 10 percent of item 34.....	\$.....		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....			
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$.....		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....		6%	\$.....
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....		12%	\$.....
40. Total excess-profits tax (total of item 38, col. 2, and item 39, col. 2).....			\$ NONE

## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See instruction 35)				
41. Adjusted net income (item 32, above).....	\$ NONE			
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....				
43. Balance subject to income tax (item 41 minus item 42).....	\$.....			
44. Portion of item 43 (not in excess of \$5,000; and tax at 12 1/2 percent).....	\$.....	12 1/2%	\$.....	
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000; and tax at 14 percent).....		14%	\$.....	
46. Portion of item 43 (in excess of \$20,000; and tax at 16 percent).....		16%	\$.....	
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$.....	
Less: Credit for income taxes paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36).....			\$.....	
48. Balance of income tax (item 47 minus item 48).....			\$ NONE	
49. Excess-profits tax (item 40, above).....			\$ NONE	
50. Total tax due (item 49 plus item 50).....			\$ NONE	

NOTE.—One form marked "DUPLICATE COPY" must be filed with this original return (310 will be assessed if duplicate copy is not filed).





AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell  
(State title)  
President

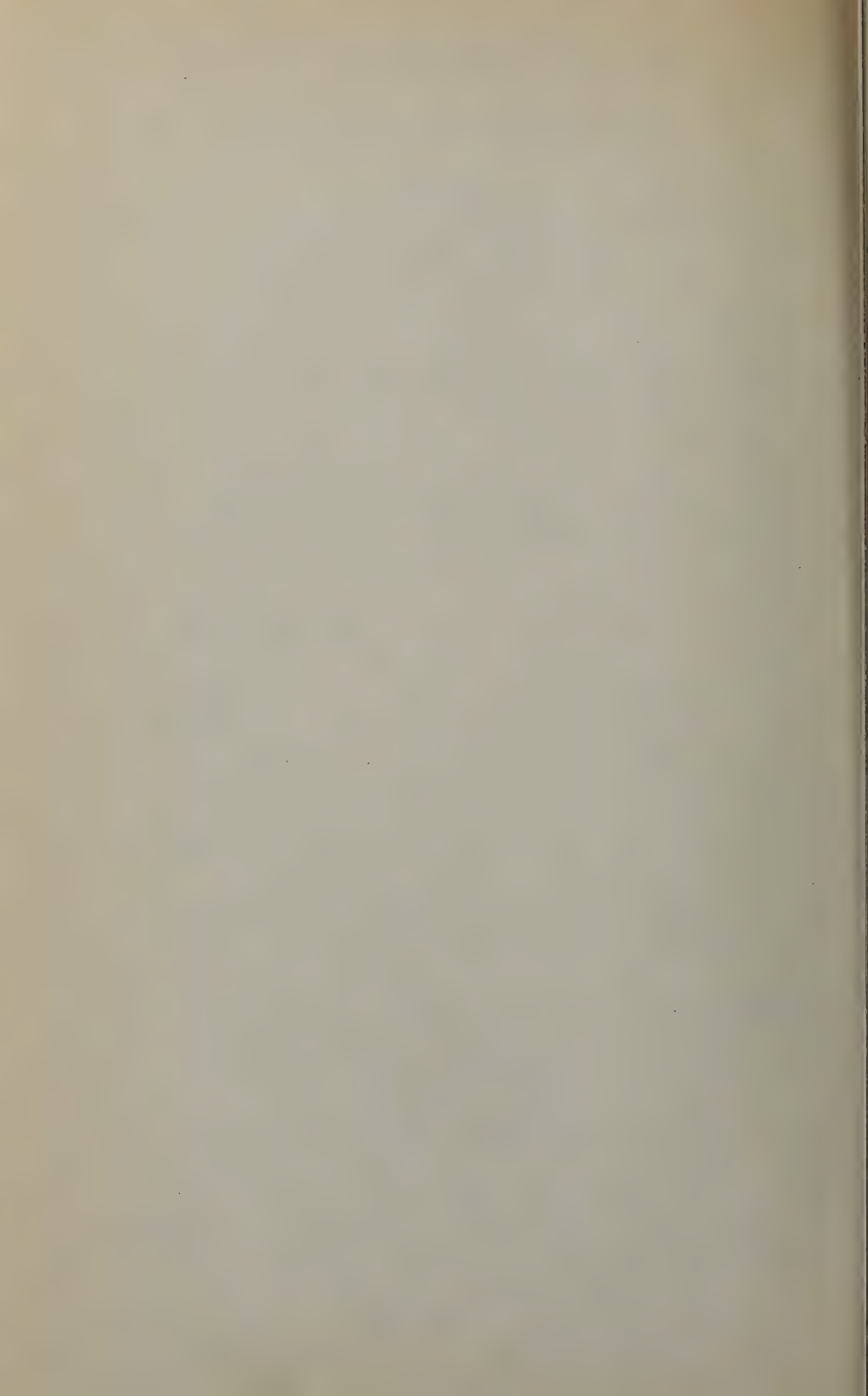
[Corporate Seal]

J. E. Gardner  
(State title)  
Secretary

Subscribed and sworn to before me this 15th day of March, 193.....

[Notarial Seal] George Rollnick, Notary Public  
(Signature of officer (Title)  
administering oath)  
GEORGE ROLLNICK

D-4  
[187]



1938

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

For corporations having total receipts of not more than \$20,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in instruction 2)

192

(Contributor's Stamp)

For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

RELIANCE ROCK COMPANY

(Name)

2730 SOUTH ALAMEDA STREET,

(Street and number)

LOS ANGELES, LOS ANGELES, CALIFORNIA.

(Post office)

(County)

File Code

Serial No.

Sheet

(Contributor's Stamp)

Cash

Check

M. O.

Post Payment

INACTIVE

(Kind of business)

ADJUSTED NET INCOME COMPUTATION

R.A. RAY, TO

Item No.	GROSS INCOME		
1. Gross sales (where inventories are an income-determining factor)	\$	Less returns and allowances	\$
2. Less cost of goods sold (from Schedule B-1)	\$		\$
3. Gross profit from sales (Item 1 minus item 2)	\$		\$
4. Gross receipts (where inventories are not an income-determining factor)	\$		\$
5. Less cost of operations (from Schedule B-2)	\$		\$
6. Gross profit where inventories are not an income-determining factor (Item 4 minus 5)	\$		\$
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1)	\$		\$
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2)	\$		\$
9. Rents (See Instruction 19)	\$		\$
10. Royalties (See Instruction 20)	\$		\$
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).	\$		\$
12. (b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D)	\$		\$
13. Dividends (from Schedule E) <b>Expenses assumed by parent company and credited by it to Reliance Rock</b>	\$		\$
14. Other income (state nature of income)	\$		\$
15. Total income in Items 3, and 6 to 13, inclusive. <b>Company</b>	\$		13,810.52
DEDUCTIONS			
16. Compensation of officers (from Schedule F)	\$		\$
17. Salaries and wages (not deducted elsewhere)	\$		\$
18. Rent (See Instruction 26)	\$		\$
19. Repairs (See Instruction 26)	\$		\$
20. Bad debts (from Schedule G)	\$		\$
21. Interest (See Instruction 26)	\$		\$
22. Taxes (from Schedule H). (Do not include Federal excess-profits tax)	\$		\$
23. Contributions or gifts paid (from Schedule I)	\$		\$
24. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29)	\$		\$
25. Depreciation (from Schedule J)	\$		13,810.52
26. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31)	\$		\$
27. Other deductions authorized by law (from Schedule K)	\$		\$
28. Total deductions in items 16 to 26, inclusive	\$		13,810.52
29. Net income for excess-profits tax computation (Item 14 minus item 27)	\$		NONE
30. Less: Federal excess-profits tax. (See Instruction 33)	\$		\$
31. Net income (Item 29 minus item 30)	\$		\$
32. Less: Interest on obligations of the United States (item 8, above)	\$		\$
33. Adjusted net income (Item 31 minus item 32)	\$		NONE

EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

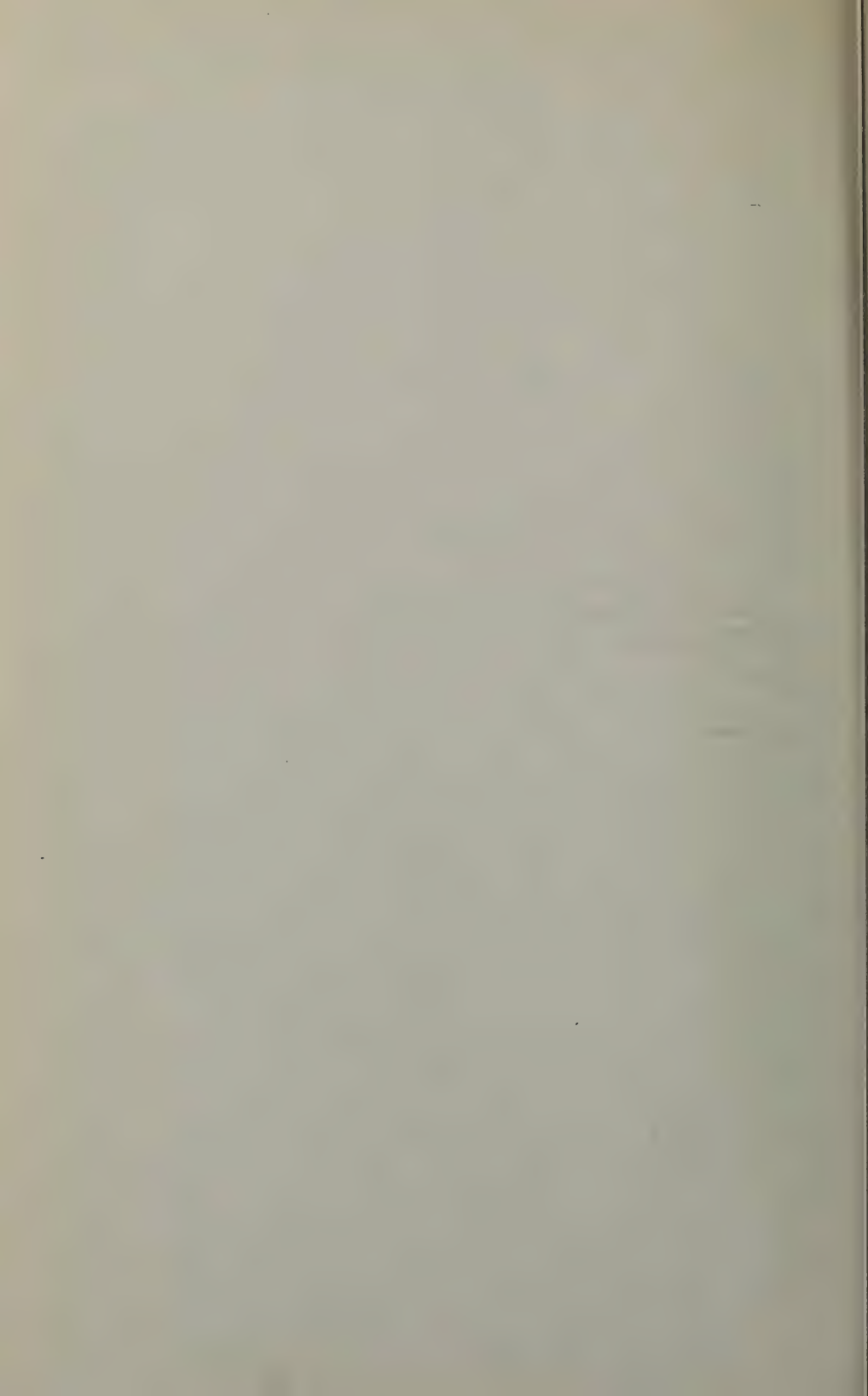
	Column 1	Col. 2 Rate	Column 3 Amount of Tax
34. Net income for excess-profits tax computation (Item 28, above)	\$ NONE		\$
35. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939)	\$		\$
36. 10 percent of item 34	\$		\$
37. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above)	\$		\$
38. Balance subject to excess-profits tax (Item 35 minus total of items 36 and 37)	\$ NONE		\$
39. Amount taxable at 6 percent (6 percent of item 38, but not more than item 37), and tax	\$	6%	\$
40. Balance taxable at 12 percent (Item 37 minus Item 38, col. 1), and tax	\$	12%	\$
41. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3)	\$		NONE

INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
42. Adjusted net income (Item 32, above)	\$ NONE		\$
43. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above)	\$		\$
44. Balance subject to income tax (Item 41 minus item 43)	\$		\$
45. Portion of item 44 (not in excess of \$5,000); and tax at 12% percent	\$	12%	\$
46. Portion of item 44 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%	\$	14%	\$
47. Portion of item 44 (in excess of \$20,000); and tax at 16 percent	\$	16%	\$
48. Total income tax (total tax in col. 3 of items 44, 45, and 46)	\$		NONE
49. Less: Credit for income taxes paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36)	\$		\$
50. Balance of income tax (Item 48 minus item 49)	\$		\$
51. Excess-profits tax (Item 40, above)	\$		\$
52. Total tax due (Item 49 plus item 50)	\$		NONE

NOTE.—One form marked "DUPLICATE COPY" must be filed with this original return (30 will be assessed if duplicate copy is not filed).

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Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
- (a) .....
- (b) .....
- (c) .....
- (d) .....
12. Other unallowable deductions:
- (a) .....
- (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
- (a) .....
- (b) .....
14. Sundry debits to earned surplus (itemize):
- (a) .....
- (b) .....
- (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 48,368.26
- 
16. Total of lines 1 to 15..... \$48,368.26
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$48,368.26

18. Adjusted net income (item 32, page 1).....

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.. ..

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

---

23. Total of lines 17 to 22..... \$48,368.26

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Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
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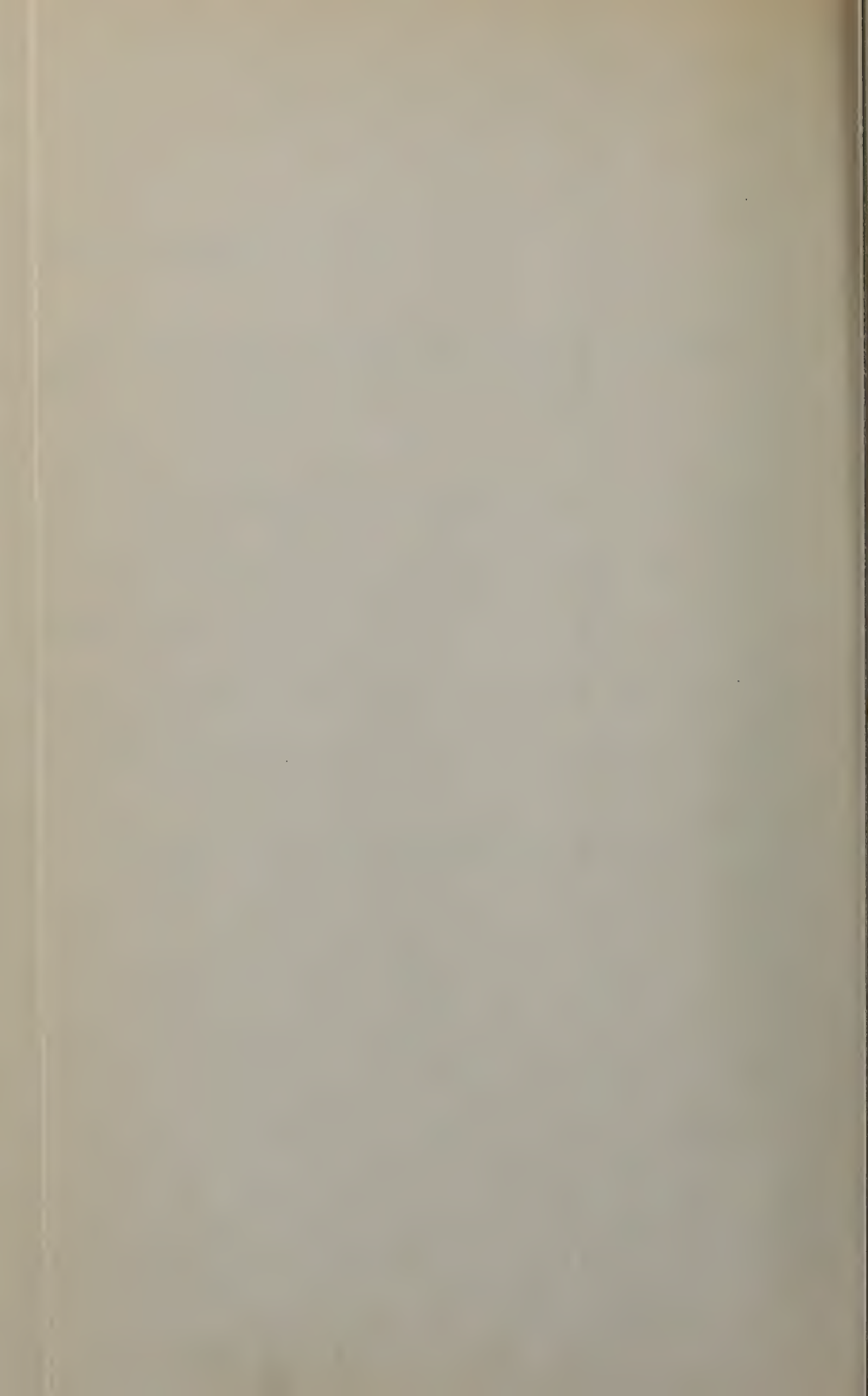
		\$	\$	\$	\$			\$
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SCHEDULE ATTACHED

Total. (Enter as item 24, page 1)								\$
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## Schedule M.—BALANCE SHEETS. (See Instruction 14)

ASSETS	Beginning of Taxable Year		End of Taxable Year	
	Amount	Value	Amount	Total
1. Cash				
2. Notes and accounts receivable. <b>Parent Company</b>	\$ 385,470 81		\$ 385,775 93	
Less reserve for bad debts		385,470 81		385,775 93
3. Inventories:				
(a) Raw materials	\$		\$	
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments: Government obligations:				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			\$	
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (itemize)	\$		\$	
6. Capital assets:				
(a) Depreciable assets (itemize) <b>Buildings</b>	\$ 52,710 84		\$ 52,710 84	
<b>Machinery &amp; equipment</b>	712,531 83		712,531 83	
<b>Furniture and fixtures</b>	4,309 49		4,309 49	
Total depreciable assets	\$ 769,552 16		\$ 769,552 16	
Less reserve for depreciation	757,252 99	12,292 17	757,565 11	11,987 05
(b) Depletable assets	\$ 199,960 56		\$ 199,960 56	
Less reserve for depletion	10,163 30	14,979 26	10,163 30	14,979 26
(c) Land				
7. Other assets (itemize) <b>prepaid rent</b>	\$ 808 02		\$ 808 02	
		808 02		808 02
8. Total Assets		\$ 548,368 26		\$ 548,368 26
LIABILITIES				
9. Accounts payable		\$		\$
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year	\$		\$	
(b) With original maturity of 1 year or more				
11. Accrued expenses (itemize)	\$		\$	
12. Other liabilities (itemize)	\$		\$	
13. Surplus reserves (itemize)	\$		\$	
14. Capital stock:				
(a) Preferred stock	\$			
(b) Common stock		500,000 00		500,000 00
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits		48,368 26		48,368 26
17. Total Liabilities		\$ 548,368 26		\$ 548,368 26

## QUESTIONS

1. Business classification. (See Instruction 16) **Inactive** which such return was filed
- If engaged in more than one of the business classifications indicated in Instruction 16, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
2. Date of incorporation **April 12, 1924**
3. State or country **Delaware**
4. State collector's office where your return for the preceding year was filed **Los Angeles**
5. The corporation's books **Consolidated Book Products Co.**
- Located at **2730 So. Alameda St., Los Angeles**
6. Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? **No** If so, an additional return on Form 1120-H must be filed.
7. Is this a consolidated return of railroad corporations? **No** If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
8. If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? **Yes** If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
9. Was the income of this corporation included in a consolidated return for any prior year? **No** If so, give name and address of corporation which filed the consolidated return and the last year for which such return was filed.
10. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? **No** If answer is "yes," give name and address of each predecessor business and the date of the change in entity.
- Upon such change, were any asset values increased or decreased? **No** If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
11. Is this return made on the basis of cash receipts and disbursements? **No** If not, describe fully what other basis or method was used in computing net income **Accrual**
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower **Cost** If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock.
13. Did the corporation make a return of information on Forms 1090 and 1099 (see Instruction 10-(1)) for the calendar year 1938? **No**
14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") **No** (If answer is "yes," attach schedule as required by Instruction 13-(2).)

## AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that the return (including any accompanying schedule and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this **1st** day of **MARCH**, 1939.



GEORGE ROLLICK



## AFFIDAVIT. (See Instruction 7)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedule and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this **1st** day of **MARCH**, 1939.



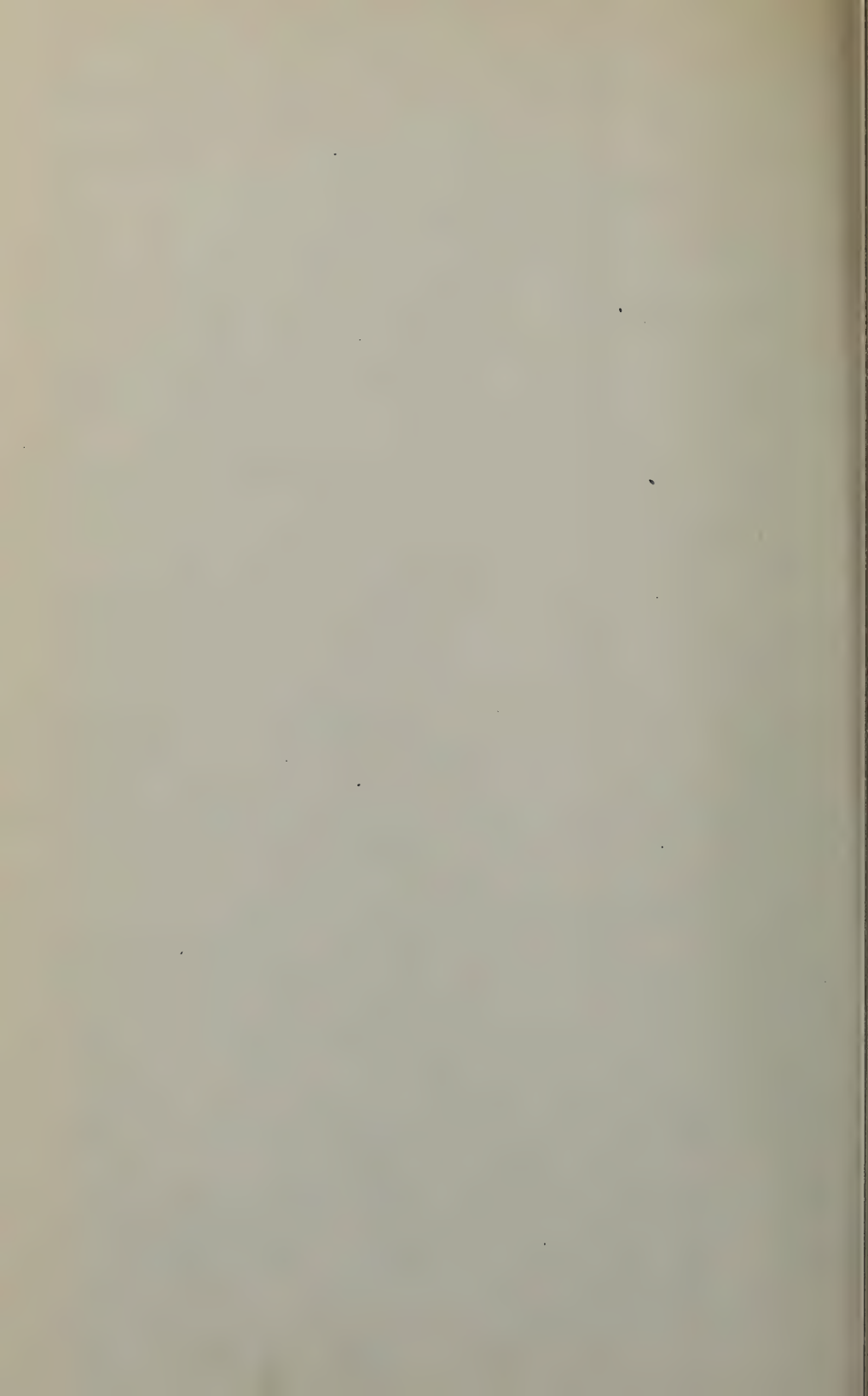
(Signature of officer administering oath)



(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)





RELIANCE ROCK COMPANY

(A Delaware Corporation)

Account Receivable – Parent Company

Analysis of Change During the Calendar Year 1938

Balance – December 31, 1938 \$385,775.93

Balance – December 31, 1937 385,470.81

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\$ 305.12

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ANALYSIS OF CHANGE

Depreciation claimed for 1938 \$13,810.52

Less excess of depreciation  
claimed for 1938 over de-  
preciation provision per books 13,505.40

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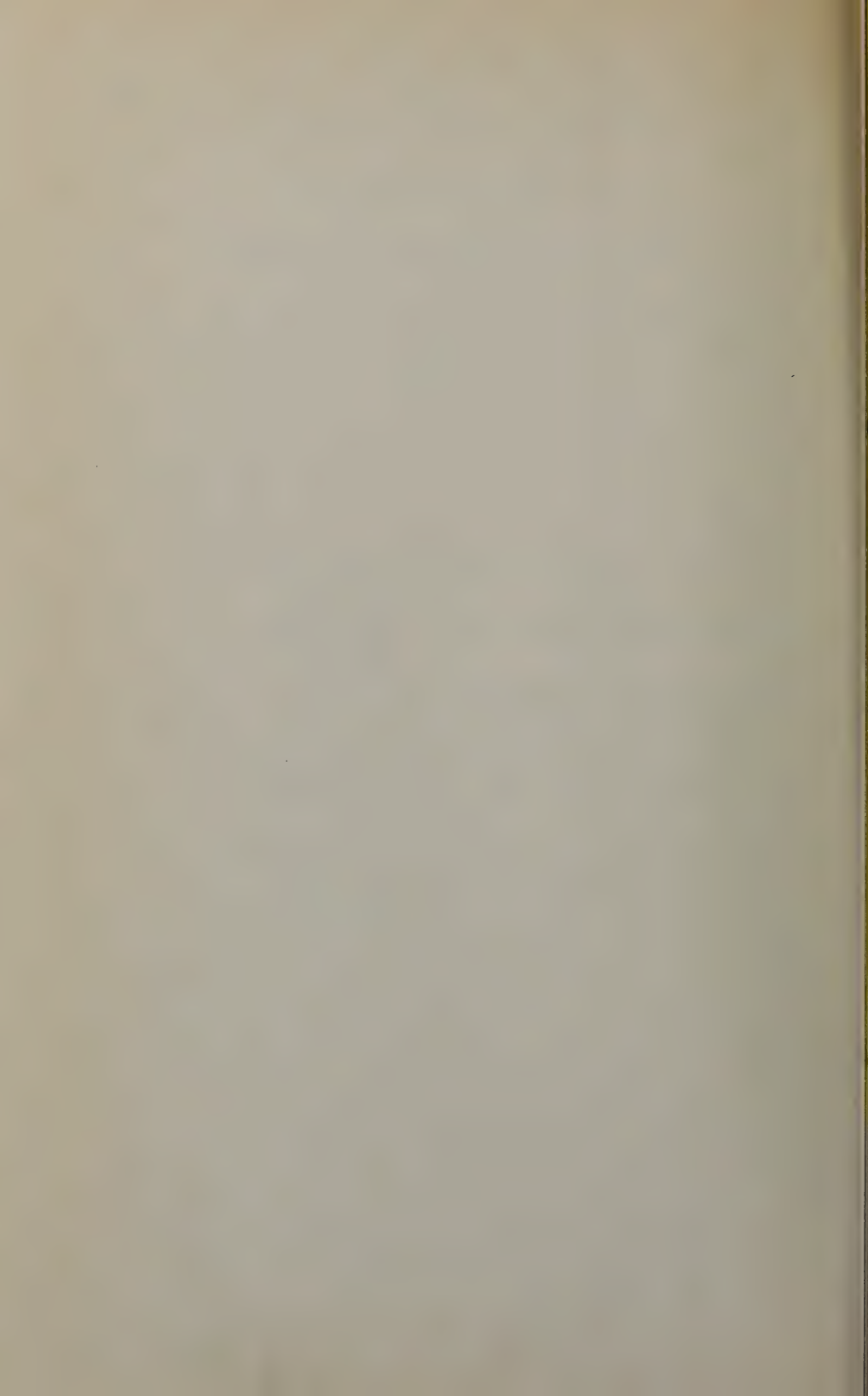
Net change as above \$ 305.12

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RELIANCE ROCK COMPANY  
(A Delaware Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

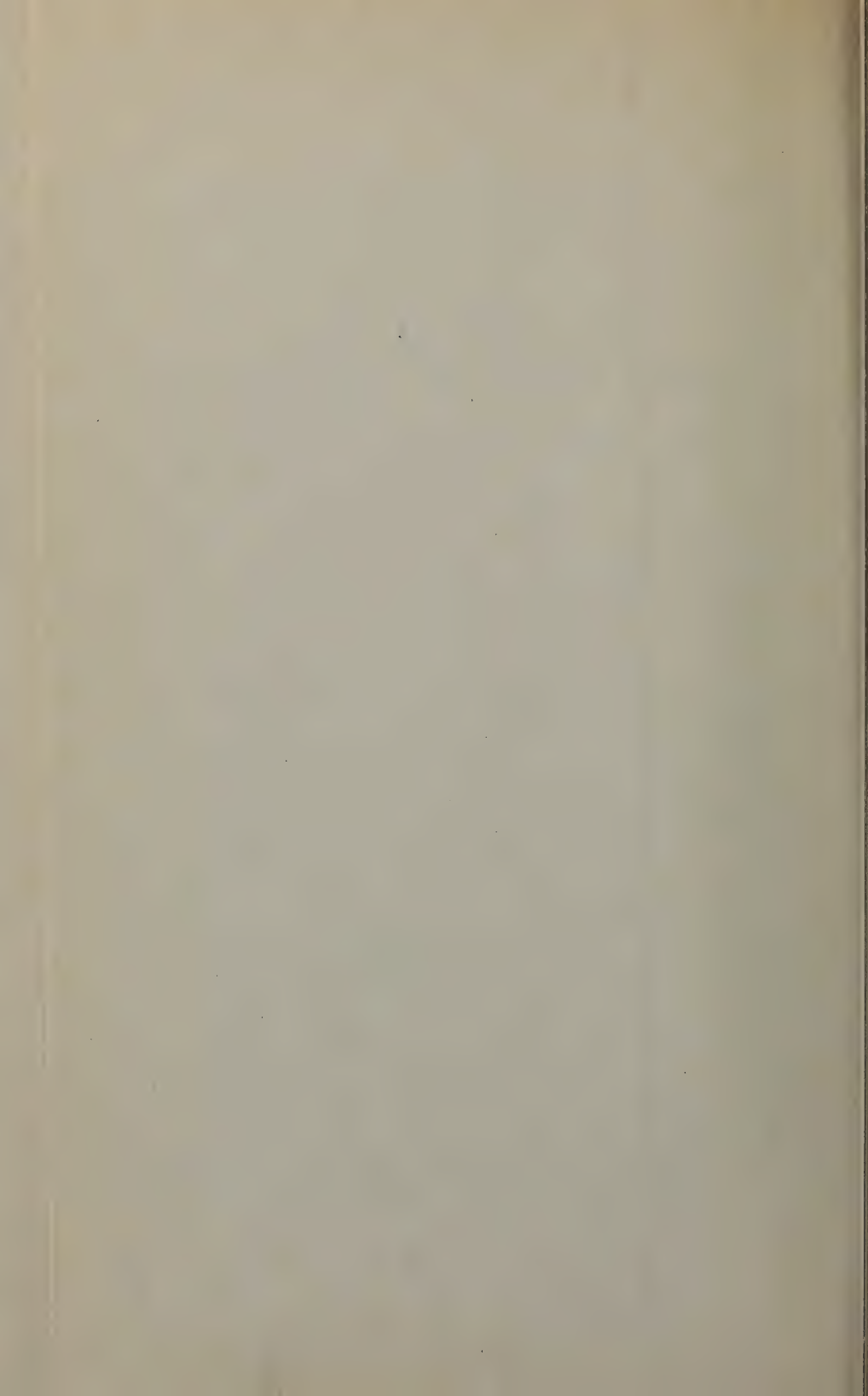
Particulars	Original Cost & Additions Net of sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 - Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Rock and Gravel Plant	\$650,708.75		\$650,708.75	\$611,361.95		\$611,361.95	\$39,346.80	3	\$13,115.60	\$26,231.20	\$650,708.75	\$624,477.55
Plant Bunker	49,215.43		49,215.43	49,215.43		49,215.43		0			49,215.43	49,215.43
Crusher Building	25,188.93		25,188.93	24,019.54		24,019.54	1,169.39	3	389.80	779.59	25,188.93	24,409.34
Office and warehouse	4,630.03		4,630.03	4,289.11		4,289.11	340.92	8	42.62	298.30	4,630.03	4,331.73
Machine Shop Equipment	13,308.21		13,308.21	12,152.48		12,152.48	1,155.73	11	105.07	1,050.66	13,308.21	12,257.55
L. A. Office Building	9,583.67		9,583.67	7,851.97		7,851.97	1,731.70	11	157.43	1,574.27	9,583.67	8,009.40
Automotive equipment	1,638.20		1,638.20	1,638.20		1,638.20					1,638.20	1,638.20
Office furniture and equipment	4,309.49		4,309.49	4,309.49		4,309.49					4,309.49	4,309.49
Miscellaneous	10,969.45		10,969.45	10,969.45		10,969.45					10,969.45	10,969.45
Total - All Property	\$769,552.16		\$769,552.16	\$725,807.62		\$725,807.62	\$43,744.54		\$13,810.52	\$29,934.02	\$769,552.16	\$739,618.14

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess or deficiency of credits to depreciation reserve, per books, over or under depreciation claimed as per schedules attached to tax returns:

Years 1934, 1935, 1936 and 1937 - per schedules attached to tax returns		\$33,678.81	\$ 33,678.81
Year 1938 - per books	\$ 305.12		
Year 1938 - per schedule above	<u>13,810.52</u>	13,505.40	\$ 13,505.40
Adjustment in 1936 account abandonment of bunkers		<u>2,226.44</u>	<u>2,226.44</u>
Totals per balance sheet as at December 31, 1938		<u>\$11,987.05</u>	<u>\$757,565.11</u>

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T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T  
INTERNAL REVENUE SERVICE

Los Angeles, Calif.

Office of the Collector  
Sixth District of California.  
In Replying Refer to - IT:LAL

March 9, 1939

Reliance Rock Co.,  
2730 South Alameda St.,  
Los Angeles, California.  
(A Corp.)

Sir:

Receipt is acknowledged of your letter of recent date, requesting for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN, (SIGNED)  
COLLECTOR.

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Treasury Department

Internal Revenue Service

# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

(Auditor's Name)

## For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

SUNSET ROCK PRODUCTS COMPANY, INC.

(Name)

2730 South Alameda Street,

(Street and number)

Los Angeles, Los Angeles, California.

(Post office)

(County)

(State)

Inactive

Kind of business

### ADJUSTED NET INCOME COMPUTATION

Item No.	GROSS INCOME		
1. Gross sales (where inventories are an income-determining factor)	\$	Less returns and allowances	\$
2. Less cost of goods sold (from Schedule B-1)			
3. Gross profit from sales (item 1 minus item 2)			
4. Gross receipts (where inventories are not an income-determining factor)	\$		
5. Less cost of operations (from Schedule B-2)			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5)			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1)			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4)). (See Instruction 18-2)			
9. Rents. (See Instruction 19)			
10. Royalties. (See Instruction 20)			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000). (b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D)			
12. Dividends (from Schedule E)			
13. Other income (state nature of income)			
14. Total income in items 3, and 6 to 13, inclusive			\$
	DEDUCTIONS		
15. Compensation of officers (from Schedule F)	\$		
16. Salaries and wages (not deducted elsewhere)			
17. Rent. (See Instruction 23)			
18. Repairs. (See Instruction 24)			
19. Bad debts (from Schedule G)			
20. Interest. (See Instruction 26)			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax)			
22. Contributions or gifts paid (from Schedule I)			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29)			
24. Depreciation (from Schedule J)			
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31)			
26. Other deductions authorized by law (from Schedule K)			
27. Total deductions in items 15 to 26, inclusive			
28. Net income for excess-profits tax computation (item 14 minus item 27)			\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 32)			
30. Net income (item 28 minus item 29)			
31. Less: Interest on obligations of the United States (item 8, above)			
32. Adjusted net income (item 30 minus item 31)			\$ NONE

### EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1 Rate	Column 2 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above)	\$ NONE	
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1939 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939)	\$	
35. 10 percent of item 34	\$	
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above)		
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36)	\$	
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax	\$	6%
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax	\$	12%
40. Total excess-profits tax (total of item 38, col. 2, and item 39, col. 2)		\$ NONE

### INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 36)			
41. Adjusted net income (item 32, above)	\$ NONE		
42. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 41, above)			
43. Balance subject to income tax (item 41 minus item 42)	\$		
44. Portion of item 43 (not in excess of \$5,000; and tax at 12 1/2 percent)	\$	12 1/2%	
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000; and tax at 14 percent)		14%	
46. Portion of item 43 (in excess of \$20,000; and tax at 16 percent)		16%	
47. Total income tax (total tax in col. 3 of items 44, 45, and 46)			\$
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36)			
49. Balance of income tax (item 47 minus item 48)			\$ NONE
50. Excess-profits tax (item 40, above)			
51. Total tax due (item 49 plus item 50)			\$ NONE

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (130 will be returned if duplicate copy is not filed).

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AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell

(State title)

President

[Corporate Seal]

J. E. Gardner

(State title)

Secretary

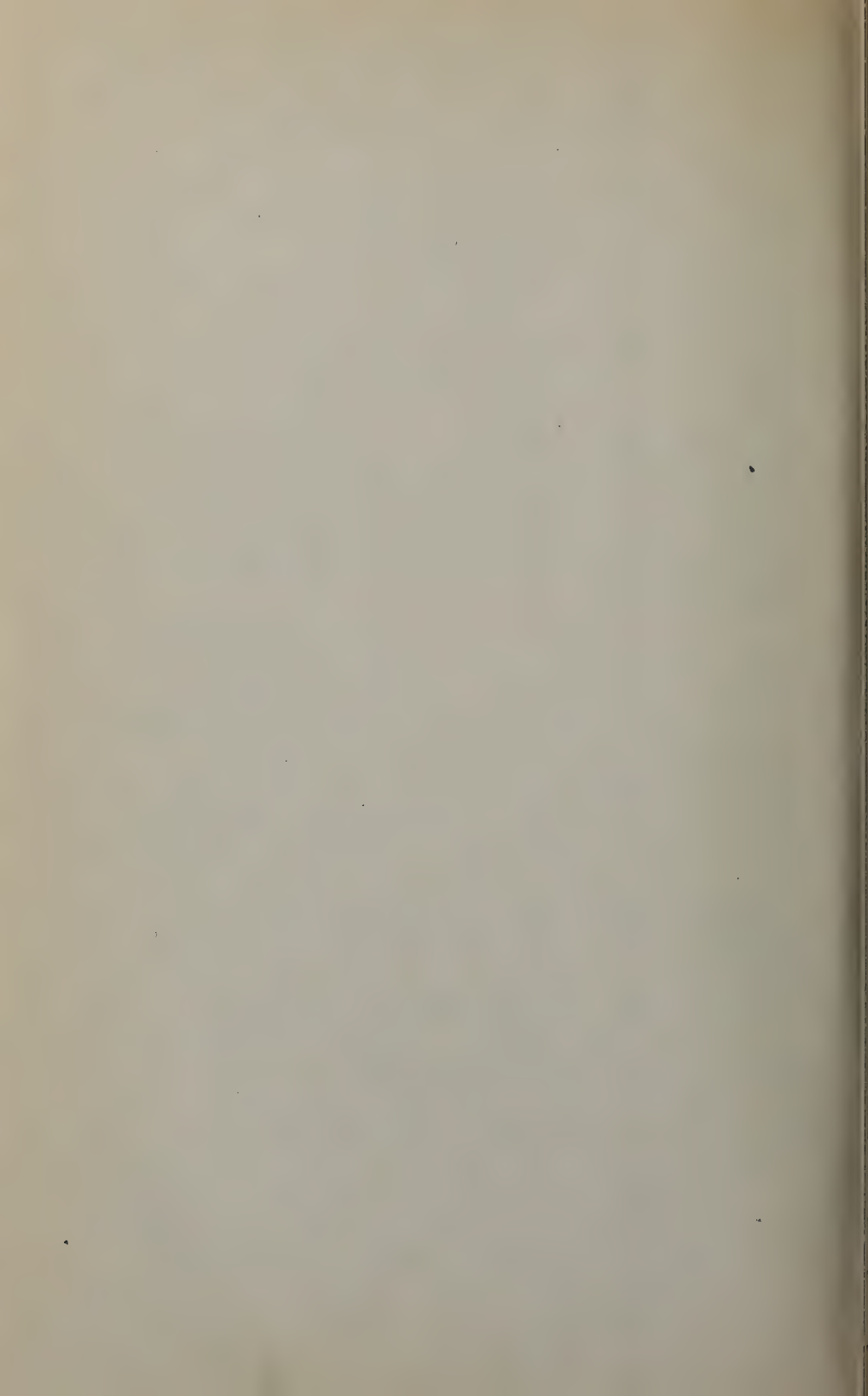
Subscribed and sworn to before me this 15th day of March, 193 .

[Notarial Seal] George Rollnick, Notary Public  
(Signature of officer (Title)  
administering oath)

GEORGE ROLLNICK

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1938

# UNITED STATES CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

For corporations having total assets at the close of the year of not more than \$20,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 3)

(Auditor's Name)

For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

SUNSET ROCK PRODUCTS COMPANY, Inc.

(City)

2730 SOUTH ALAMEDA STREET,

(Street and number)

LOS ANGELES, LOS ANGELES, CALIFORNIA

(Post office)

(County)

(State)

INACTIVE

Kind of business

## ADJUSTED NET INCOME COMPUTATION

Item No.

1. Gross sales (where inventories are an income-determining factor)..... \$.....	Loss returns and allowances..... \$.....		
2. Less cost of goods sold (from Schedule B-1).....			
3. Gross profit from sales (Item 1 minus item 2).....			
4. Gross receipts (where inventories are not an income-determining factor)..... \$.....			
5. Less cost of operations (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (Item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-(1)).....			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4)). (See Instruction 18-(3)).			
9. Rents. (See Instruction 19).....			
10. Royalties. (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....			
13. Other income (state nature of income) credited by it to Sunset Rock Products Company, Inc.			
14. Total income in items 3, and 6 to 13, inclusive.....			19,974.23
<b>DEDUCTIONS</b>			
15. Compensation of officers (from Schedule F).....			
16. Salaries and wages (not deducted elsewhere).....		321.80	
17. Rent. (See Instruction 23).....			
18. Repairs. (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest. (See Instruction 26).....			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			
24. Depreciation (from Schedule J).....		19,652.43	
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....			
26. Other deductions authorized by law (from Schedule K).....			
27. Total deductions in items 15 to 26, inclusive.....			19,974.23
28. Net income for excess-profits tax computation (Item 14 minus item 27).....			\$ None
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....			\$ None

## EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (Item 28, above).....	\$ None		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$.....		
35. 10 percent of item 34.....	\$.....		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above).....	\$.....		
37. Balance subject to excess-profits tax (Item 33 minus total of items 35 and 36).....	\$.....		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....	\$.....	6%	\$.....
39. Balance taxable at 12 percent (Item 37 minus item 38, col. 1), and tax.....	\$ None	12%	\$ None
40. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3).....			\$ None

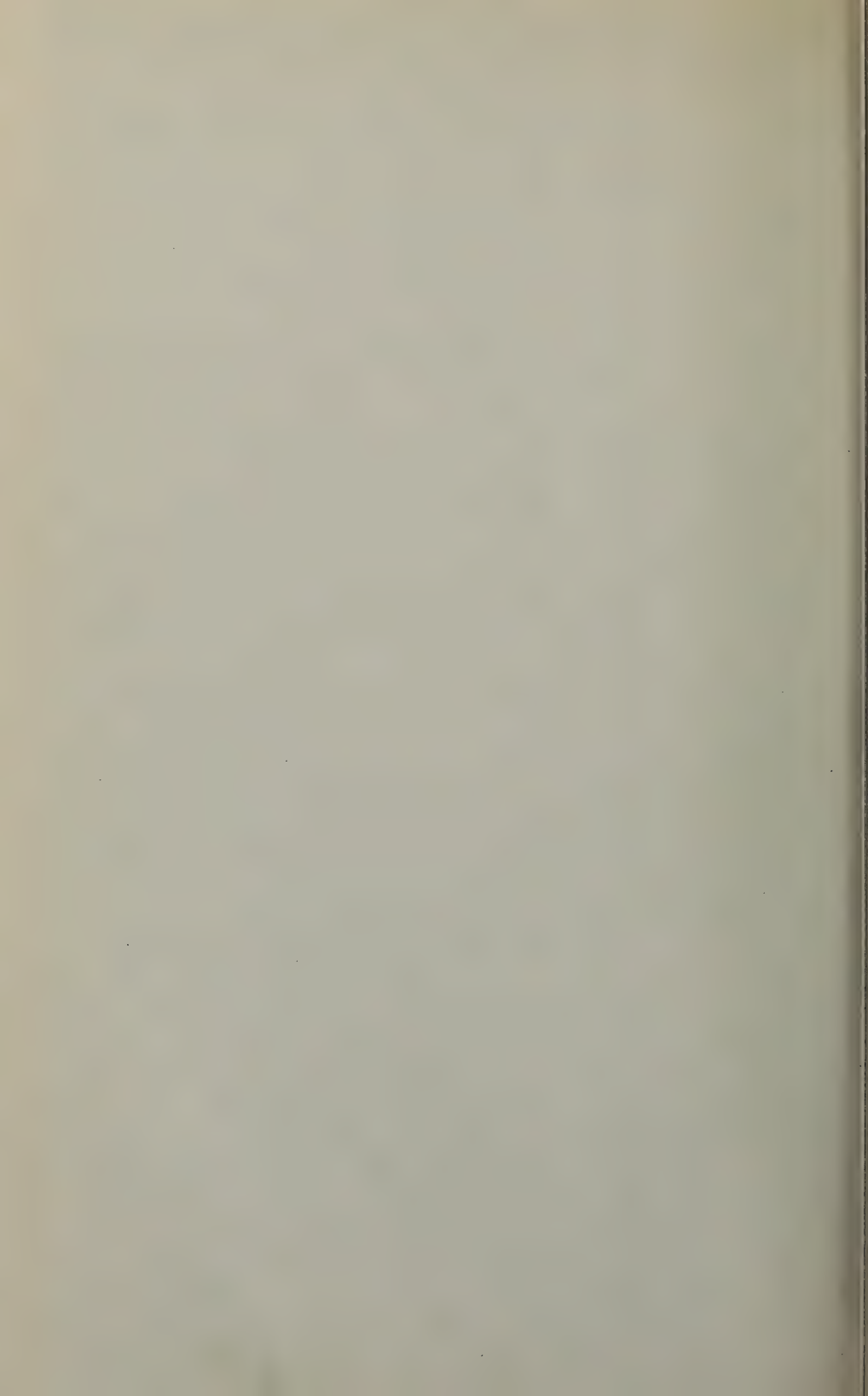
## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 38)

41. Adjusted net income (Item 32, above).....	\$ None		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....	\$.....		
43. Balance subject to income tax (Item 41 minus item 42).....	\$.....		
44. Portion of item 43 (not in excess of \$5,000) and tax at 12% percent.....	\$.....	12%	\$.....
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000) and tax at 14%.....	\$.....	14%	\$.....
46. Portion of item 43 (in excess of \$20,000) and tax at 16 percent.....	\$.....	16%	\$ None
47. Total income tax (total tax in col. 3 of Items 44, 45, and 46).....	\$.....		
48. Less: Credit for income taxes paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36).....	\$.....		
49. Balance of income tax (Item 47 minus item 48).....	\$.....		
50. Excess-profits tax (Item 40, above).....	\$.....		
51. Total tax due (Item 49 plus item 50).....	\$ None		

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (\$10 will be assessed if duplicate copy is not filed).

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Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
  - (a) .....
  - (b) .....
  - (c) .....
  - (d) .....
12. Other allowable deductions:
  - (a) .....
  - (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
  - (a) .....
  - (b) .....
14. Sundry debits to earned surplus (itemize):
  - (a) .....
  - (b) .....
  - (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 17,089.05
16. Total of lines 1 to 15..... \$17,089.05
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$17,089.05

18. Adjusted net income (item 32, page 1)....

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness....

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

- 
23. Total of lines 17 to 22..... \$17,089.05



Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
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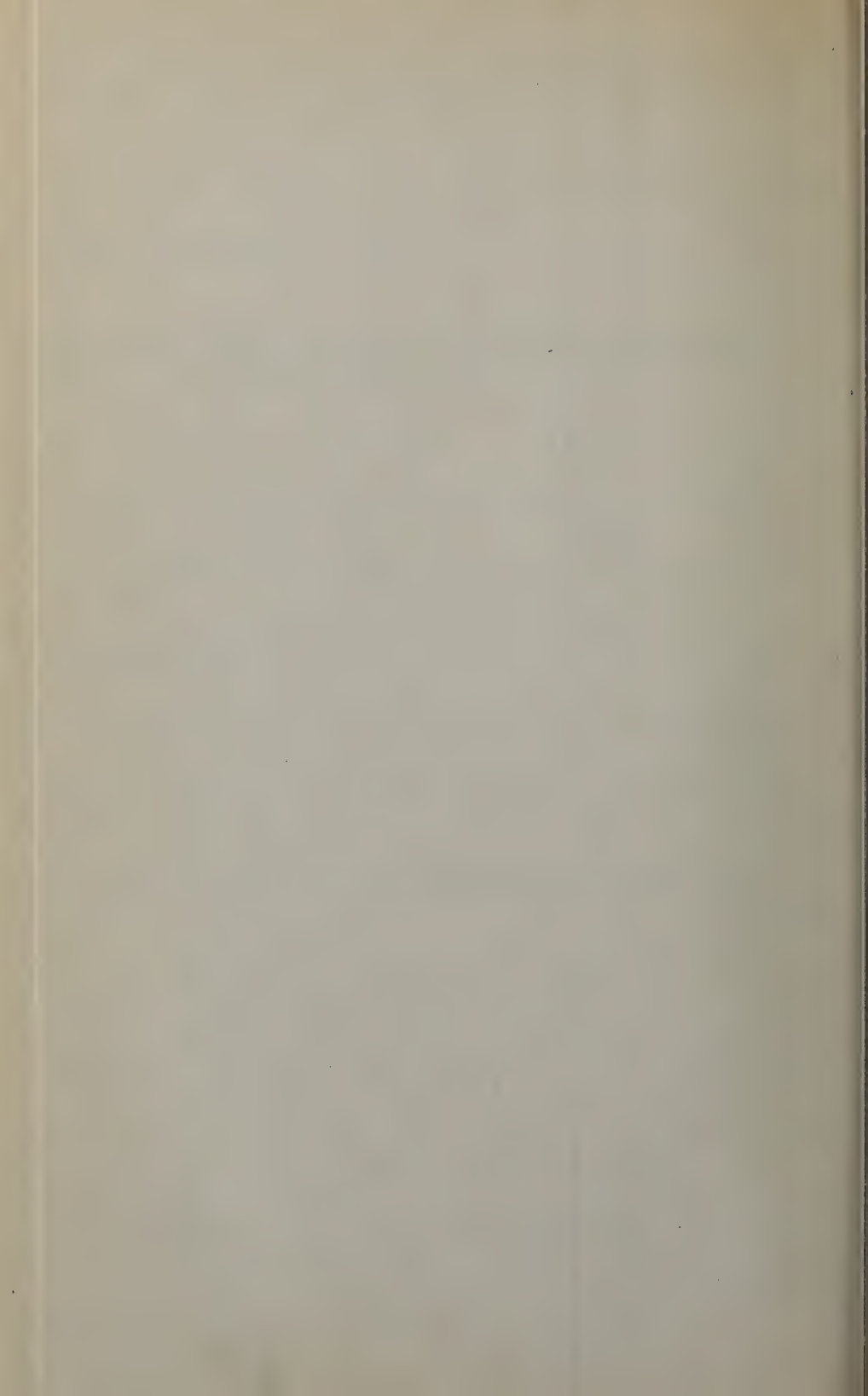
\$.....\$.....\$.....\$.....\$.....

SCHEDULE ATTACHED

Total. (Enter as item 24, page 1).....\$.....

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ASSETS	Beginning of Taxable Year		End of Taxable Year	
	Amount	Value	Amount	Total
1. Cash				
2. Notes and accounts receivable <u>Parrot Company</u>	\$ 190,608 36	\$ 190,608 36	\$ 190,608 36	190,608 36
Less reserve for bad debts				
3. Inventories:				
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (Itemize)				
6. Capital assets:				
(a) Depreciable assets (Itemize)				
<u>Machinery and equipment</u>	\$ 259,951 05		\$ 259,951 05	
<u>Furniture and fixtures</u>	930 22		930 22	
Total depreciable assets	\$ 260,781 27		\$ 260,781 27	
Less reserve for depreciation	259,717 61	1,063 66	260,355 65	425 62
(b) Depletable assets				
Less reserve for depletion				
(c) Land		1,000 00		1,000 00
7. Other assets (Itemize) <u>Prepaid rent</u>	\$ 71 80		\$ 71 80	
	281,876 97		281,876 97	
8. Total Assets		\$ 482,910 95		\$ 482,910 95
LIABILITIES				
9. Accounts payable				
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year				
(b) With original maturity of 1 year or more				
11. Accrued expenses (Itemize)				
12. Other liabilities (Itemize)				
13. Surplus reserve (Itemize)				
14. Capital stock:				
(a) Preferred stock				
(b) Common stock	500,000 00	500,000 00		500,000 00
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits		17,089 95		17,089 95
17. Total Liabilities		\$ 482,910 95		\$ 482,910 95

QUESTIONS

- Business classification. (See Instruction 10) Inactive which such return was filed \_\_\_\_\_
- If engaged in more than one of the business classifications indicated in Instruction 10, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
- Date of incorporation June 16, 1928
- State or country California
- State collector's office where your return for the preceding year was filed Los Angeles
- The corporation's books are in care of Consolidated Rock Products Co.
- Located at 2730 South Alameda Street, Los Angeles
- Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? No If so, an additional return on Form 1120-B must be filed.
- Is this a consolidated return of railroad corporations? No If so, procure from the collector of internal revenue for your district Form 861, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return.
- If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? No If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
- Was the income of this corporation included in a consolidated return for any prior year? No If so, give name and address of corporation which filed the consolidated return and the last year for which such return was filed \_\_\_\_\_
- Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes," give name and address of each predecessor business and the date of the change in entity \_\_\_\_\_
- Upon such change, were any asset values increased or decreased? If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
- Is this return made on the basis of cash receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income Accrual
- State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock \_\_\_\_\_
- Did the corporation make a return of information on Forms 1090 and 1090 (see Instruction 10-(1)) for the calendar year 1938? No
- Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "Yes" or "no") No (If answer is "yes," attach schedule as required by Instruction 13-(2).)

AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself, do declare and say that the return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this 31st day of MARCH, 1939.

George Rollnick  
(Signature of officer submitting return)

NOTARY PUBLIC  
(Title)

CORPORATE SEAL  
(Place title)

AFFIDAVIT. (See Instruction 7)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom the return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1939.

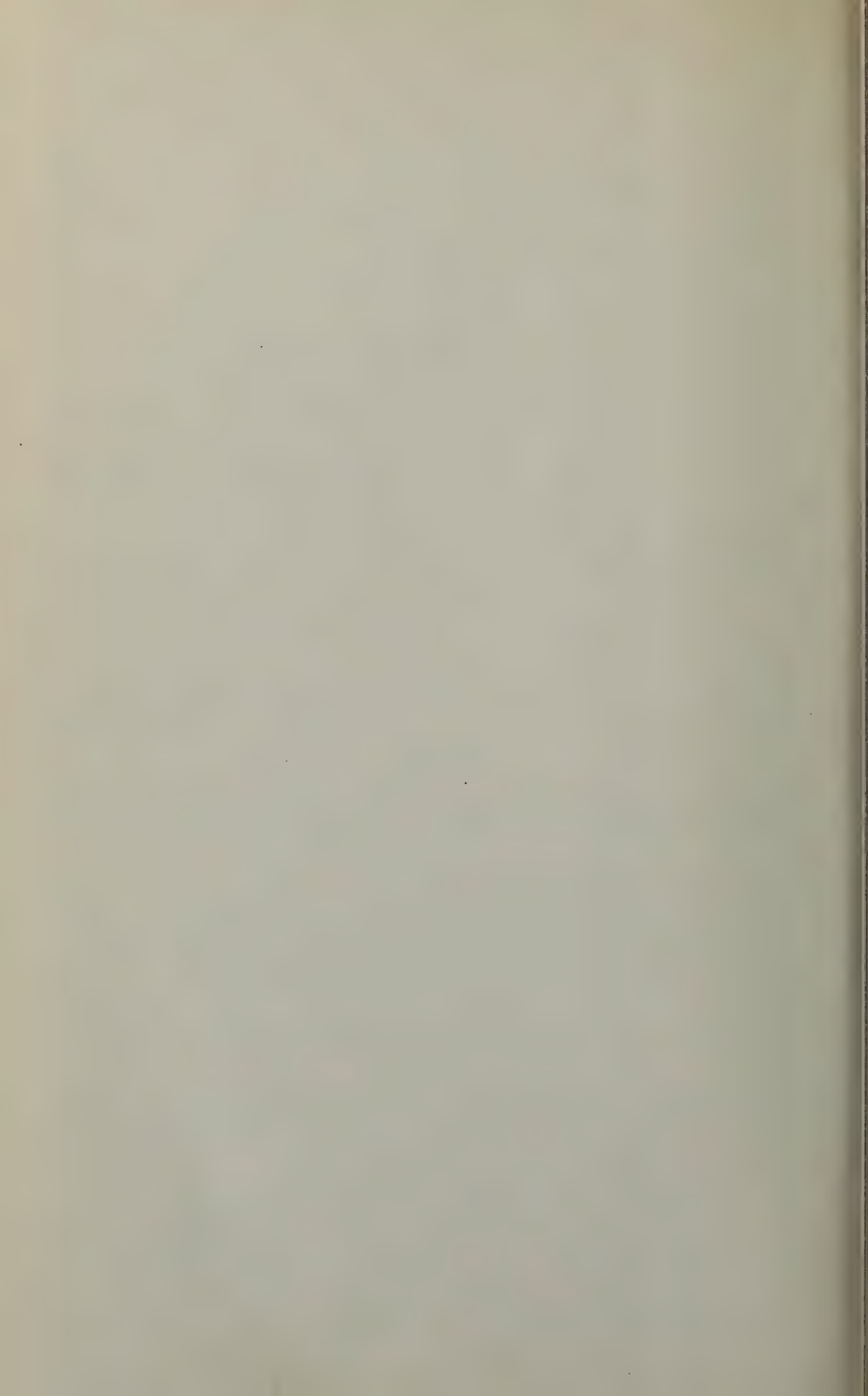
George Rollnick  
(Signature of officer submitting return)

(Title)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employee, if any)





SUNSET ROCK PRODUCTS COMPANY, Inc.

(A California Corporation)

Account Receivable – Parent Company

Analysis of Changes during the Calendar Year 1938

Balance – December 31, 1938 \$199,608.36

Balance – December 31, 1937 198,898.52

---

Net Change \$ 709.84

---

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ANALYSIS OF CHANGES

Charges:

Accrued rentals \$ 321.80

Depreciation 19,652.43

---

\$19,974.23

Deficiency of depreciation accrued per books, under depreciation claimed for tax purposes 19,014.39

---

\$ 959.84

Credits:

Rent paid 250.00

---

Net Charges \$ 709.84

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SUNSET ROCK PRODUCTS COMPANY, Inc.  
(A California Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

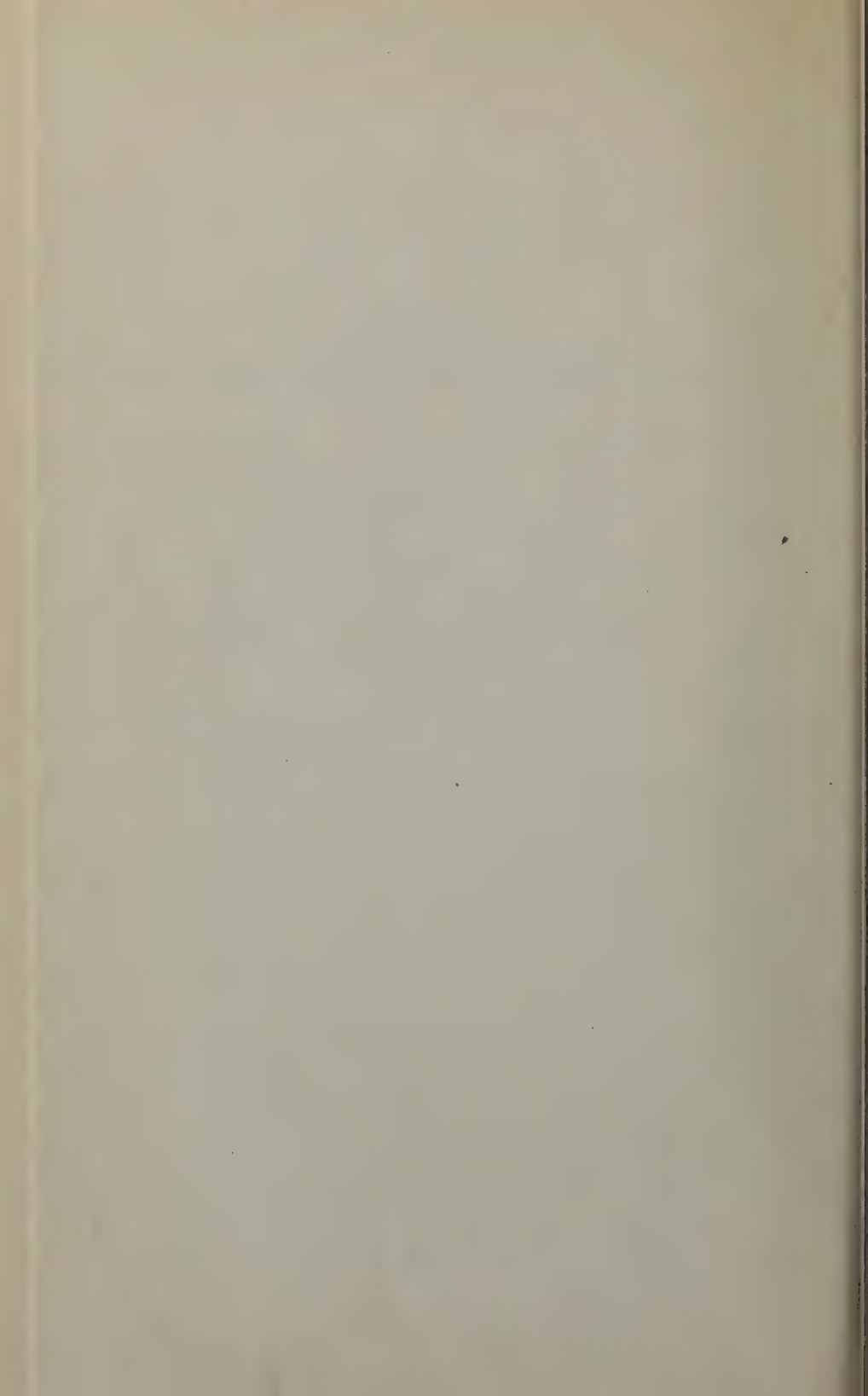
Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Rock and gravel plant	\$253,481.62		\$253,481.62	\$234,551.66		\$234,551.66	\$18,929.96	1	\$18,929.96	-	\$253,481.62	\$253,481.62
Bunker	6,369.43		6,369.43	5,646.96		5,646.96	722.47	1	722.47	-	6,369.43	6,369.43
Office furniture and equipment	930.22		930.22	930.22		930.22	-	0	-	-	930.22	930.22
	<u>\$260,781.27</u>		<u>\$260,781.27</u>	<u>\$241,128.84</u>		<u>\$241,128.84</u>	<u>\$19,652.43</u>		<u>\$19,652.43</u>			

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess of credits to depreciation reserve as per books over depreciation claimed for tax purposes as per schedules attached to tax returns:

Years 1934, 1935, 1936 and 1937 per tax schedules		\$18,588.77	\$ 18,588.77
Year 1938 - per books	\$ 638.04		
Year 1938 - per schedule above	<u>19,652.43</u>	<u>\$19,014.39</u>	<u>19,014.39</u>
Totals - per balance sheet as at December 31, 1938		<u>\$ 425.62</u>	<u>\$260,781.27</u> <u>\$260,355.65</u>

Σ 11





T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T  
INTERNAL REVENUE SERVICE  
Los Angeles, Calif.

Office of the Collector  
Sixth District of California.  
In Replying Refer to – IT:LAL

March 9, 1939

Sunset Rock Products Co., Inc.  
2730 South Alameda Street,  
Los Angeles, California,  
(A Corporation)

Sir:

Receipt is acknowledged of your letter of recent date, requesting for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER

By NAT ROGAN (Signed)  
COLLECTOR.

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# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in instruction 3)

## For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

UNION ROCK COMPANY  
(A Delaware Corporation)

2730 South Alameda Street,

Los Angeles, Los Angeles, California.

Kind of business Inactive

File Code  
Serial No.  
District  
(Cashier's Name)  
**RECEIVED**  
REV  
CASH  
CHECK  
First Payment

### ADJUSTED NET INCOME COMPUTATION

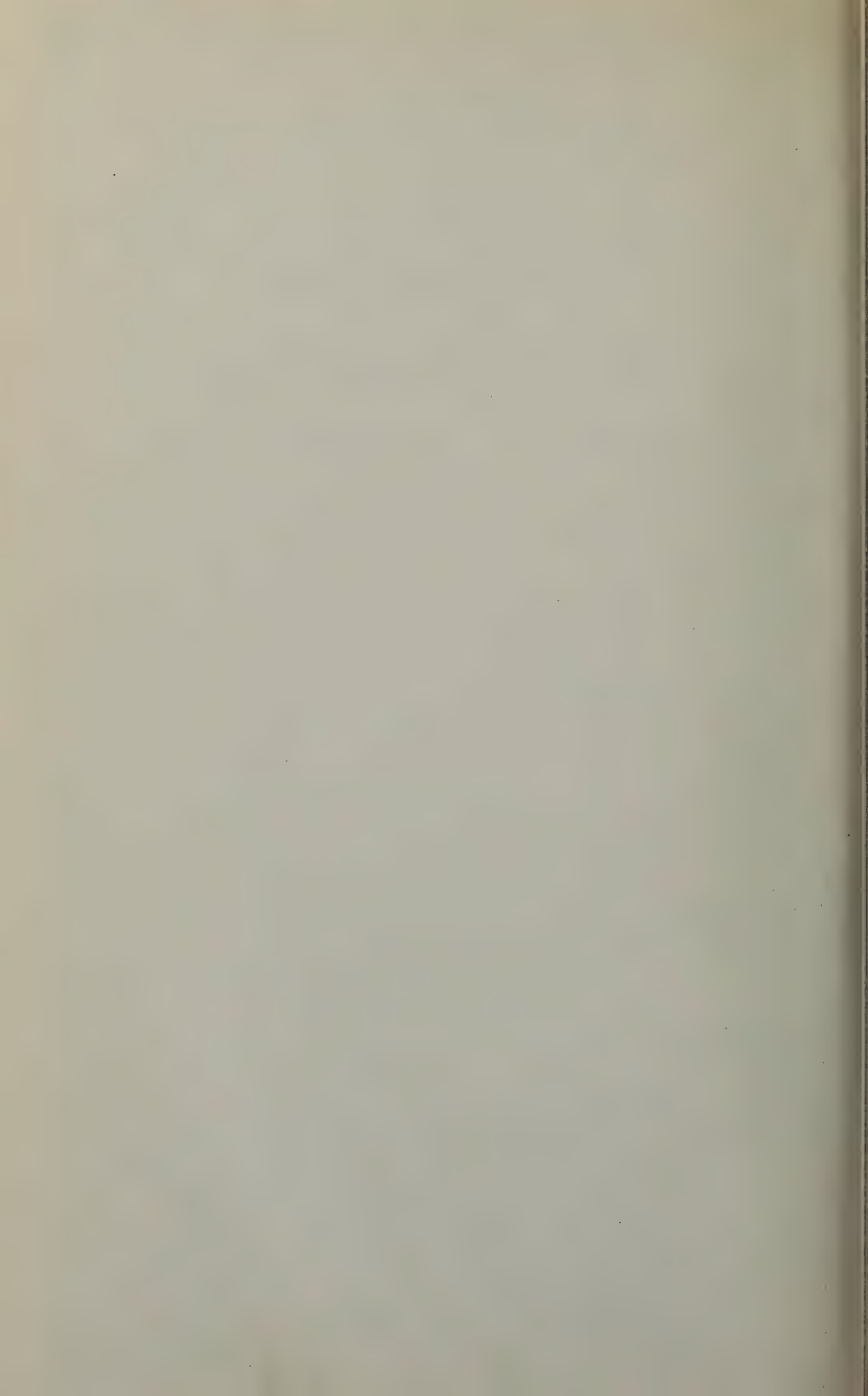
Item No.	GROSS INCOME	Less returns and allowances	
1. Gross sales (where inventories are an income-determining factor)	\$	\$	
2. Less cost of goods sold (from Schedule B-1)			
3. Gross profit from sales (Item 1 minus Item 2)			
4. Gross receipts (where inventories are not an income-determining factor)	\$		
5. Less cost of operations (from Schedule B-2)			
6. Gross profit where inventories are not an income-determining factor (Item 4 minus 5)			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-(1))			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-(2))			
9. Rents. (See Instruction 19)			
10. Royalties. (See Instruction 20)			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D)			
12. Dividends (from Schedule E)			
13. Other income (state nature of income)			
14. Total income in Items 3, and 6 to 13, inclusive			\$
<b>DEDUCTIONS</b>			
15. Compensation of officers (from Schedule F)			\$
16. Salaries and wages (not deducted elsewhere)			
17. Rent. (See Instruction 23)			
18. Repairs. (See Instruction 24)			
19. Bad debts (from Schedule G)			
20. Interest. (See Instruction 26)			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax)			
22. Contributions or gifts paid (from Schedule I)			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29)			
24. Depreciation (from Schedule J)			
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31)			
26. Other deductions authorized by law (from Schedule K)			
27. Total deductions in Items 15 to 26, inclusive			
28. Net income for excess-profits tax computation (Item 14 minus Item 27)			\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 33)			
30. Net income (Item 28 minus Item 29)			
31. Less: Interest on obligations of the United States (Item 8, above)			
32. Adjusted net income (Item 30 minus Item 31)			\$ NONE

### EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (Item 28, above)	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939)	\$		
35. 10 percent of Item 34	\$		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of Item 32, above)			
37. Balance subject to excess-profits tax (Item 33 minus total of Items 35 and 36)	\$		
38. Amount taxable at 6 percent (5 percent of Item 34, but not more than Item 37, and tax	\$	6%	\$
39. Balance taxable at 12 percent (Item 37 minus Item 38, col. 1), and tax	\$	12%	\$
40. Total excess-profits tax (total of Item 38, col. 2, and Item 39, col. 3)			\$ NONE

### INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (Item 32, above)	\$ NONE		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of Item 41, above)	\$		
43. Balance subject to income tax (Item 41 minus Item 42)	\$		
44. Portion of Item 43 (not in excess of \$5,000); and tax at 12% percent	\$	12%	\$
45. Portion of Item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%	\$	14%	\$
46. Portion of Item 43 (in excess of \$20,000); and tax at 16 percent	\$	16%	\$
47. Total income tax (total tax in col. 3 of Items 44, 45, and 46)			\$
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36)			\$
49. Balance of income tax (Item 47 minus Item 48)			\$ NONE
50. Excess-profits tax (Item 40, above)			\$
51. Total tax due (Item 49 plus Item 50)			\$ NONE





AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell  
(State title)  
President

[Corporate Seal]

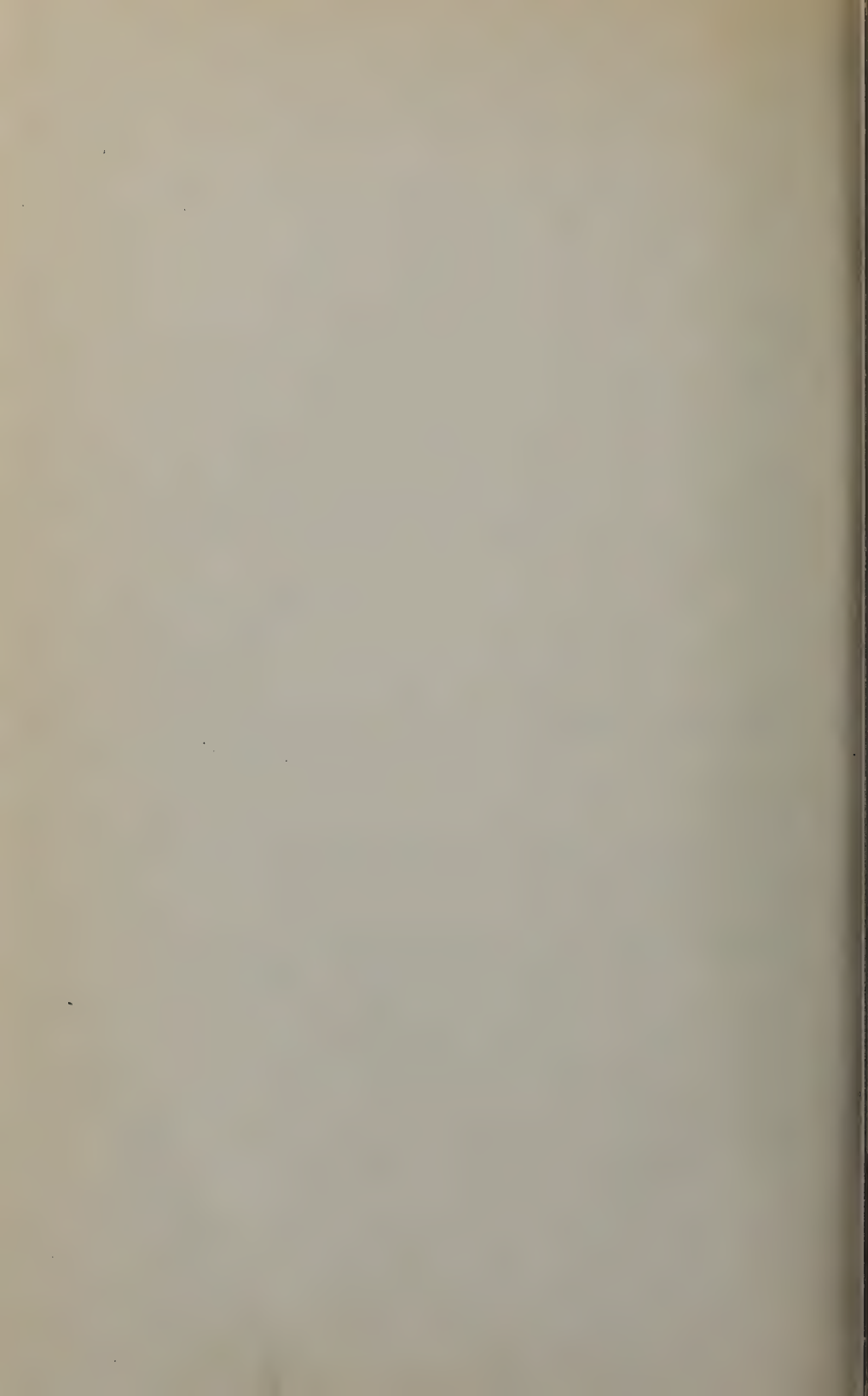
J. E. Gardner  
(State title)  
Secretary

Subscribed and sworn to before me this 15th day of March, 193.....

[Notarial Seal] George Rollnick, Notary Public  
(Signature of officer (Title)  
administering oath)  
GEORGE ROLLNICK

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1938

## UNITED STATES CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1938

For corporations having total receipts of not more than \$20,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

(Auditor's Name)

For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

UNION ROCK COMPANY

2730 SOUTH ALAMEDA STREET,

LOS ANGELES, LOS ANGELES, CALIFORNIA

(Post office)

(County)

(State)

INACTIVE

Kind of business

File No. 1478  
Serial No. 856691

District

(Auditor's Name)

Cash Checks M. O.

Post Payment

## ADJUSTED NET INCOME COMPUTATION

## Item No.

GROSS INCOME			
1. Gross sales (where inventories are an income-determining factor).....	\$.....	Less returns and allowances.....	\$.....
2. Less cost of goods sold (from Schedule B-1).....			
3. Gross profit from sales (item 1 minus item 2).....			
4. Gross receipts (where inventories are not an income-determining factor).....	\$.....		
5. Less cost of operations (from Schedule B-2).....			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5).....			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18- (1)).....			
8. Interest on obligations of the United States (from Schedule A, line 10 (a) (4)). (See Instruction 18- (2)).....			
9. Rents. (See Instruction 19).....			
10. Royalties. (See Instruction 20).....			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000).....			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D).....			
12. Dividends (from Schedule E).....			
13. Other income (state nature of income) credited by it to the account of the.....			
14. Total income in items 3, and 6 to 13, inclusive.....			\$ 213,133 06
DEDUCTIONS			
15. Compensation of officers (from Schedule F).....	\$.....		
16. Salaries and wages (not deducted elsewhere).....			
17. Rent. (See Instruction 23).....		15,356 28	
18. Repairs. (See Instruction 24).....			
19. Bad debts (from Schedule G).....			
20. Interest. (See Instruction 26).....		120,056 68	
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax).....			
22. Contributions or gifts paid (from Schedule I).....			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29).....			
24. Depreciation (from Schedule J).....		60,913 67	
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31).....		1,295 89	
26. Other deductions authorized by law (from Schedule K).....		15,510 54	
27. Total deductions in items 15 to 26, inclusive.....			213,133 06
28. Net income for excess-profits tax computation (item 14 minus item 27).....			\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 33).....			
30. Net income (item 28 minus item 29).....			
31. Less: Interest on obligations of the United States (item 8, above).....			
32. Adjusted net income (item 30 minus item 31).....			\$ NONE

## EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

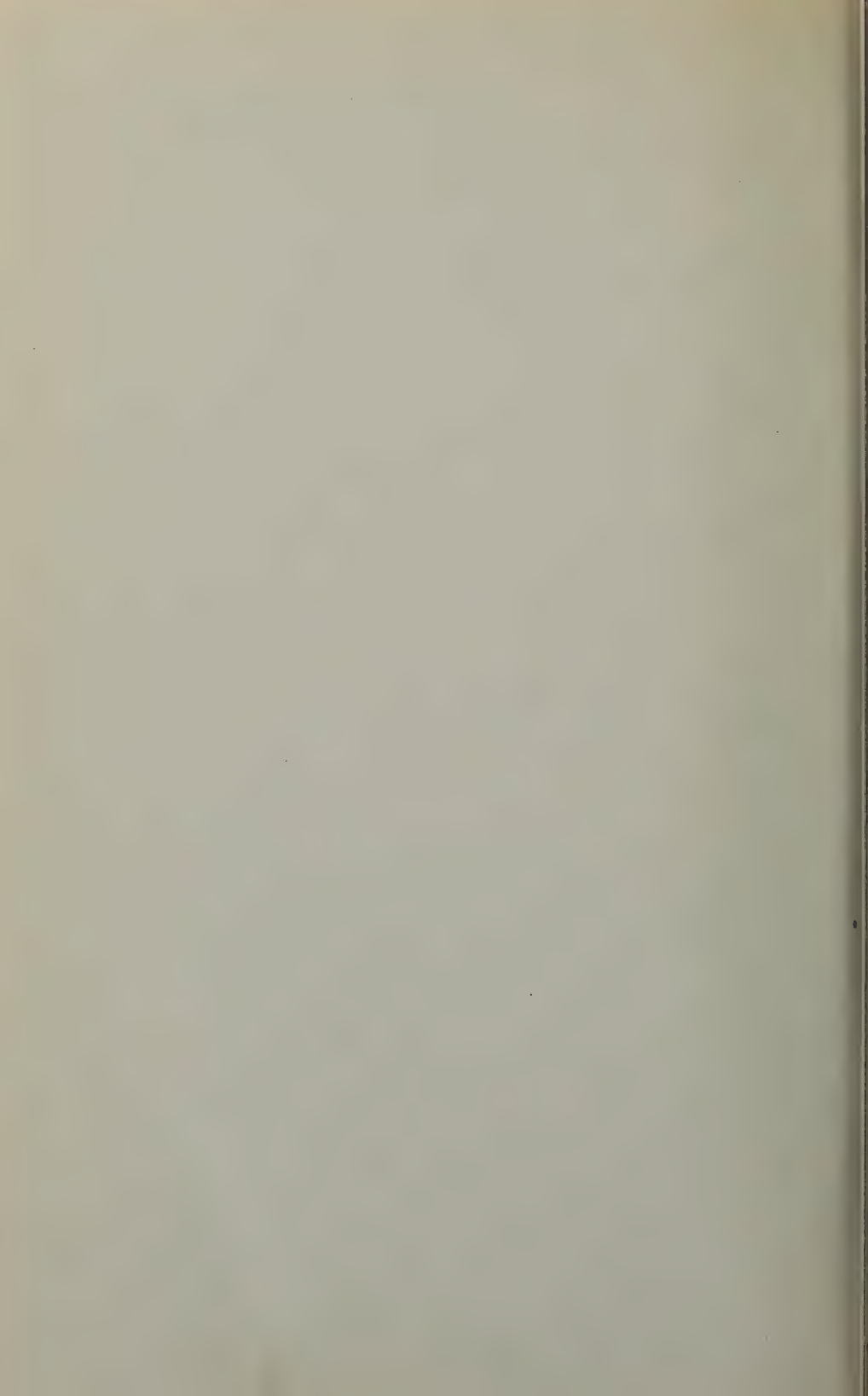
	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above).....	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1938 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939).....	\$.....		
35. 10 percent of item 34.....	\$.....		
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 33, above).....	\$.....		
37. Balance subject to excess-profits tax (item 33 minus total of items 35 and 36).....	\$ NONE		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax.....		6%	\$.....
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax.....		12%	\$.....
40. Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3).....			\$ NONE

## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (item 32, above).....	\$ NONE		
42. Dividends received credit (85% of col. 2, Schedule E, but not in excess of 85% of item 41, above).....	\$.....		
43. Balance subject to income tax (item 41 minus item 42).....	\$.....		
44. Portion of item 43 (not in excess of \$5,000); and tax at 12% percent.....		12%	\$.....
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14%.....		14%	\$.....
46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent.....		16%	\$.....
47. Total income tax (total tax in col. 3 of items 44, 45, and 46).....			\$.....
48. Less: Credit for income taxes paid to a foreign country or U.S. possession allowed a domestic corporation. (See Instruction 36).....			\$.....
49. Balance of income tax (item 47 minus item 48).....			\$.....
50. Excess-profits tax (item 40, above).....			\$.....
51. Total tax due (item 49 plus item 50).....			\$ NONE

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (\$30 will be assessed if duplicate copy is not filed)

4=6





Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
  - (a) .....
  - (b) .....
  - (c) .....
  - (d) .....
12. Other unallowable deductions:
  - (a) .....
  - (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
  - (a) .....
  - (b) .....
14. Sundry debits to earned surplus (itemize):
  - (a) .....
  - (b) .....
  - (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 34,481.13
16. Total of lines 1 to 15..... \$34,481.13
17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$34,481.13

18. Adjusted net income (item 32, page 1).....

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness. ....

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

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23. Total of lines 17 to 22..... \$34,481.13

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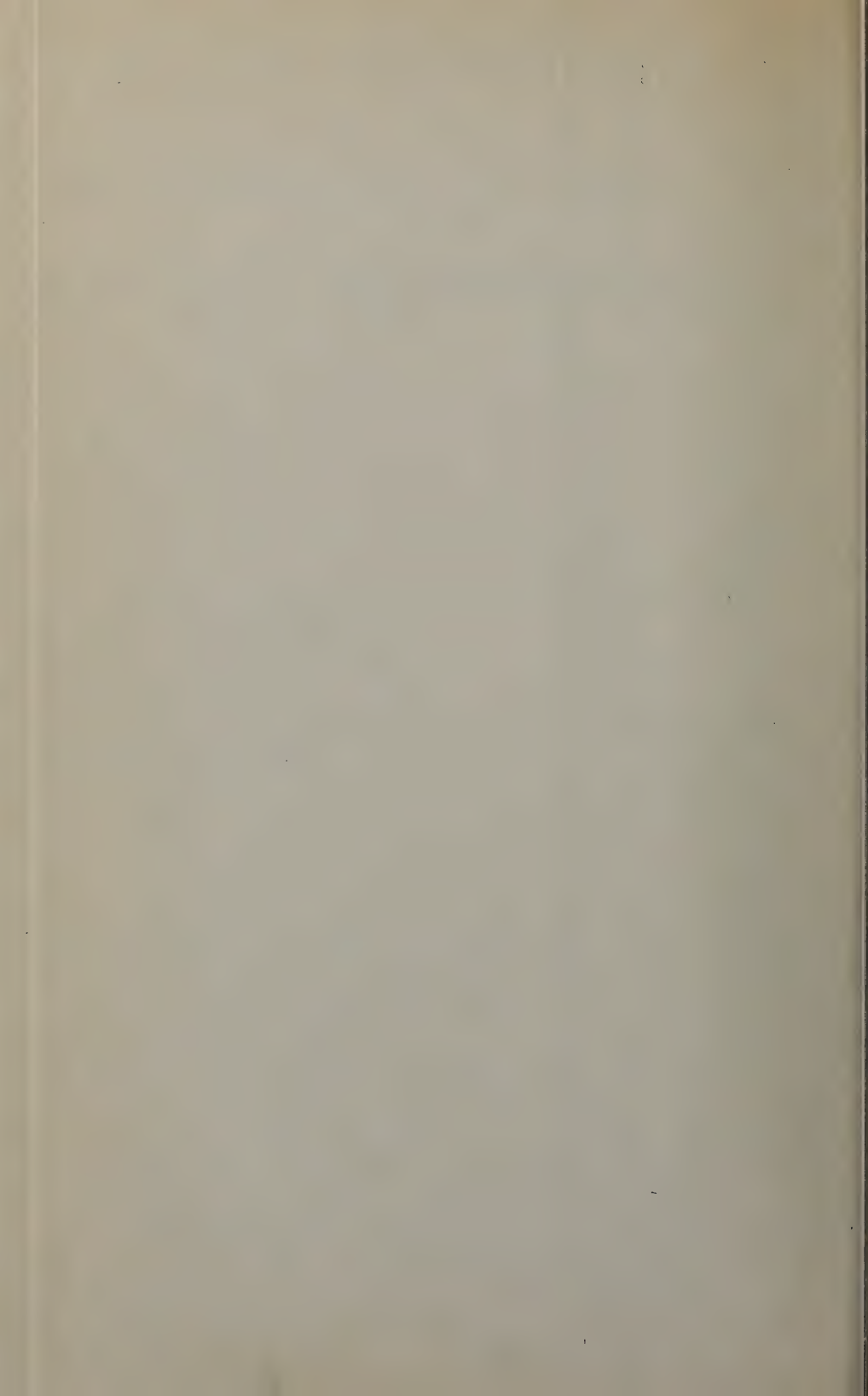


Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
		\$	\$	\$	\$			\$
SCHEDULE ATTACHED								
Total. (Enter as item 24, page 1)								
								\$

Schedule K.—Other Deductions. (See Instruction 32)

Amortization of leaseholds	\$ 5,413.44
Amortization of bond discount and expense	10,097.10
	<u>\$15,510.54</u>



## ASSETS

	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
1. Cash.....		\$		\$
2. Notes and accounts receivable. <i>Parent Company</i> .....	\$2,721,108 28		\$2,885,969 17	
Less reserve for bad debts.....		2,721,108 28		2,885,969 17
3. Inventories:				
(a) Raw materials.....	\$		\$	
(b) Work in process.....				
(c) Finished goods.....				
(d) Supplies.....				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.....	\$		\$	
(b) Obligations of the United States.....				
(c) Obligations of instrumentalities of the United States.....				
5. Other investments (itemize).....	\$		\$	
<i>Stocks of subsidiaries</i> .....		907,554 31		907,554 31
6. Capital assets:				
Leaseholds.....	636,770 35		536,770 85	
(a) Depreciable assets (itemize):				
Buildings.....	\$ 16,580 71		\$ 15,757 30	
Machinery & equipment.....	2,409,399 67		2,497,723 11	
Furniture & fixtures.....	15,881 51		15,381 51	
Total depreciable assets.....	\$3,159,132 74		\$3,157,208 27	
Less reserve for depreciation.....	2,806,692 49	352,440 25	2,853,502 96	313,705 31
(b) Depletable assets.....	\$ 708,493 97		\$ 755,623 97	
Less reserve for depletion.....	10,123 30	561,565 77	195,421 09	560,269 88
(c) Land.....	461 20	252,579 78	470 80	252,579 78
7. Other assets (itemize):				
Prepaid rent.....	\$ 461 20		\$ 470 80	
Bond sinking fund.....	15,633 70		15,633 70	
Bond discount & expense.....	80,923 62	97,021 62	70,826 52	86,931 02
8. Total Assets.....		\$4,392,270 01		\$5,007,009 47
LIABILITIES				
9. Accounts payable.....				
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year.....	\$		\$	
(b) With original maturity of 1 year or more.....	18,000 00	18,000 00	14,000 00	14,000 00
11. Accrued expenses (itemize):				
Interest.....	\$ 517,290 00		\$ 636,530 00	
All other.....	1,179 69	518,469 69	729 15	637,209 15
12. Other liabilities (itemize):				
Bonds outstanding.....		1,979,300 00		1,979,500 00
13. Surplus reserves (itemize):				
14. Capital stock:				
(a) Preferred stock.....	\$		\$	
(b) Common stock.....		2,410,781 45		2,410,781 45
15. Paid-in or capital surplus.....				
16. Earned surplus and undivided profits.....		31,431 13		31,431 13
17. Total Liabilities.....		\$4,392,270 01		\$5,007,009 47

## QUESTIONS

1. Business classification. (See Instruction 16)..... which such return was filed.....
- If engaged in more than one of the business classifications indicated in Instruction 16, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
2. Date of incorporation..... September 19, 1921
3. State or country..... Delaware
4. State collector's office where your return for the preceding year was filed..... Los Angeles
5. The corporation's books are kept at..... Consolidated Book Products Co.  
Located at..... 2730 South Main Street, Los Angeles
6. Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1938? No..... If so, an additional return on Form 1120-H must be filed.
7. Is this a consolidated return of railroad corporations? No..... If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
8. If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? Yes..... If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
9. Was the income of this corporation included in a consolidated return for any prior year? No..... If so, give name and address of corporation which filed the consolidated return and the last year for
10. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No..... If answer is "yes," give name and address of each predecessor business and the date of the change in entity
- Upon such change, were any asset values increased or decreased? If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
11. Is this return made on the basis of cash receipts and disbursements? No..... If not, describe fully what other basis or method was used in computing net income..... Actual
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower..... None..... If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock
13. Did the corporation make a return of information on Forms 1090 and 1099 (see Instruction 10-(1)) for the calendar year 1938? No.....
14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No..... (If answer is "yes," attach schedule as required by Instruction 13-(2).)

## AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that the return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, full, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

Subscribed and sworn to before me this 1st day of MARCH, 1939.

NOTARIAL SEAL

George Rolinger

NOTARY PUBLIC (Type)

CORPORATE SEAL

(State title)

## AFFIDAVIT. (See Instruction 7)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedule and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profit tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1939.

NOTARIAL SEAL

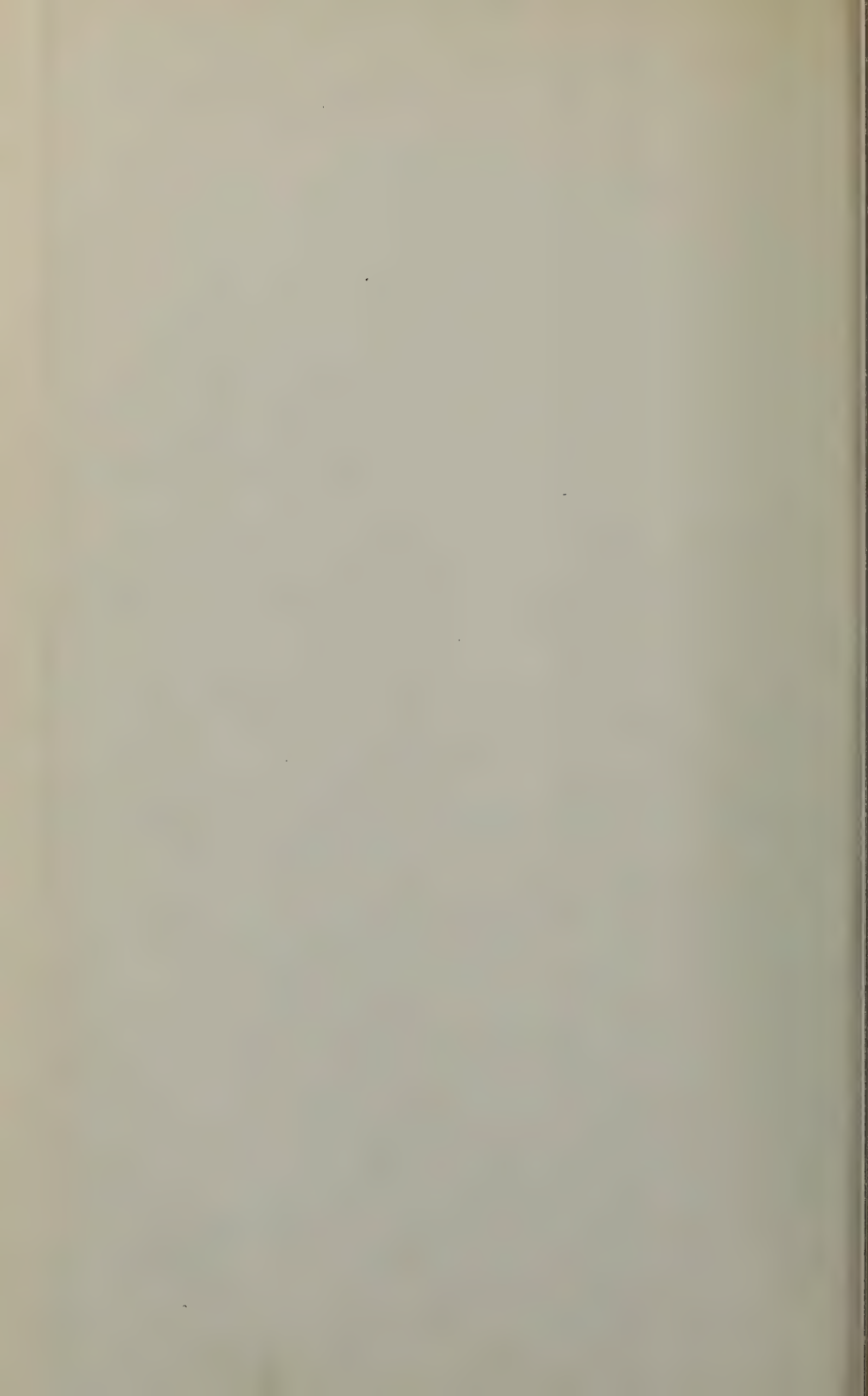
(Signature of officer administering oath)

(Type)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Title of firm or company, if any)





UNION ROCK COMPANY

(A Delaware Corporation)

Accounts Receivable – Parent Company

Analysis of changes in current account with parent  
company during the year 1938

- - -

This account has been kept in accordance with the terms  
of an operating agreement dated April 1, 1929

- - -

Balance per books – December 31, 1938	\$2,885,969.17
Balance per books – December 31, 1937	2,721,108.28
	<hr/>
	\$ 164,860.89
	<hr/> <hr/>

ANALYSIS OF CHANGE

Charges:

Expenses assumed by parent company:

Rent	\$ 15,356.28
Interest	120,056.68
Amortization of bond dis- count & expense	10,097.10
Depreciation	60,913.67
Depletion	1,295.89
Amortization of leaseholds	5,413.44
	<hr/>
	\$213,133.06

Excess of depreciation claimed for 1938 over de- preciation per books	\$ 31,437.20
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Amortization of leaseholds - not deductible	11,920.56
--	-----------

Credit to property accounts	109.00
-----------------------------	--------

Total charges	\$193,725.42
---------------	--------------

## Credits:

Additions to property	\$ 8,184.53
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Payment on trust deed note	4,000.00
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Rentals paid	15,930.00
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Payment of interest on trust deed note	750.00
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Total Credits	28,864.53
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Net change during the year 1938	\$164,860.89
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## UNION ROCK COMPANY

(A Delaware Corporation)

## Item 25 – Deduction for Depletion for Year 1938

Property	Date Acquired	Cost	DEPLETION	
			Prior Years	Year 1938
Baldwin Park	1923–24	\$157,981.36	\$ 62,469.82	
Claremont	1927	82,435.44	4,367.28	\$1,243.55
Crossland	1923	5,000.00		
Durbin	1927	236,000.00	126,723.75	
Davies	1923	1,700.00		
Duarte	1923	160,000.00		
Fish Canyon	1922	7,516.00		
Largo	1923	10,010.00	567.35	52.34
Orange	1927	24,318.20		
Reed	1927	3,060.00		
Scott	1923	8,900.00		
Yaeger	1927	58,772.97		
Cost		<u>\$755,693.97</u>	<u>\$194,128.20</u>	<u>\$1,295.89</u>
Depletion to December 31, 1937			\$194,128.20	
Depletion during 1938			1,295.89	
Total reserve per books as at December 31, 1938			<u>\$195,424.09</u>	

## UNION ROCK COMPANY

(A Delaware Corporation)

## Schedule "K" - Deduction for Amortization of Leaseholds For the Calendar Year 1938

<u>Lessor</u>	<u>Plant</u>	<u>PERIOD</u>		<u>Consideration For Lease</u>	<u>Amortization For 1938</u>
		<u>From</u>	<u>To</u>		
Matilda Haack	Boulevard	6-1-26	6- 1-39	\$ 68,750.00	\$ 5,413.44
North American Venture Company	Rivas	6-1-25	12-31-36	188,020.85	—o—
Total to Schedule "K"					\$ 5,413.44

Unallowable amortization of leaseholds,  
set up on appraised values

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				<u>Appraised Value</u>	
Azusa Foothill Citrus Company	Largo	12-31-28	2-27-54	\$150,000.00	\$ 5,960.28
" " "	Kincaid	12-31-28	2-27-54	150,000.00	5,960.28
Total per books					\$ 17,334.00

Revenue for Amortization of Leaseholds,  
as per books

---

Amortization to December 31, 1937	\$438,011.57
Provision during 1938	17,334.00
Amortization to December 31, 1938	\$455,345.57



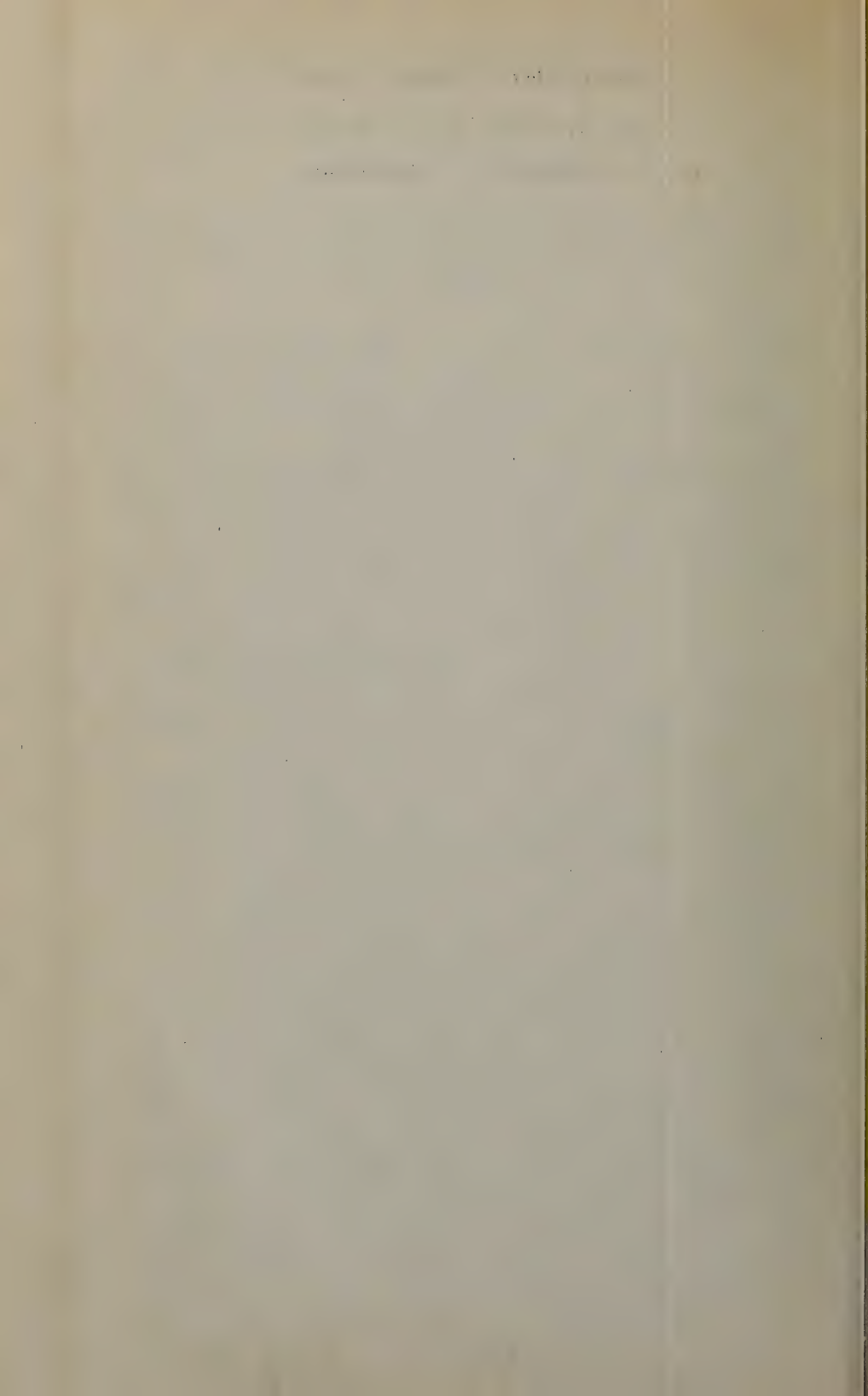
UNION ROCK COMPANY  
(A Delaware Corporation)

Stock owned in other Corporations as at December 31,  
1938

<u>Company</u>	<u>Address</u>	Percentage Of Stock Owned	Date Stock Acquired	Tax Return Filed At
Reliance Rock Company	2730 South Alameda St.	100%	1929	Los Angeles
Union Rock Land Co.	2730 So. Alameda St.	100	1924	Los Angeles
Orange County Rock Corp.	2730 So. Alameda St.	100	1927	Los Angeles

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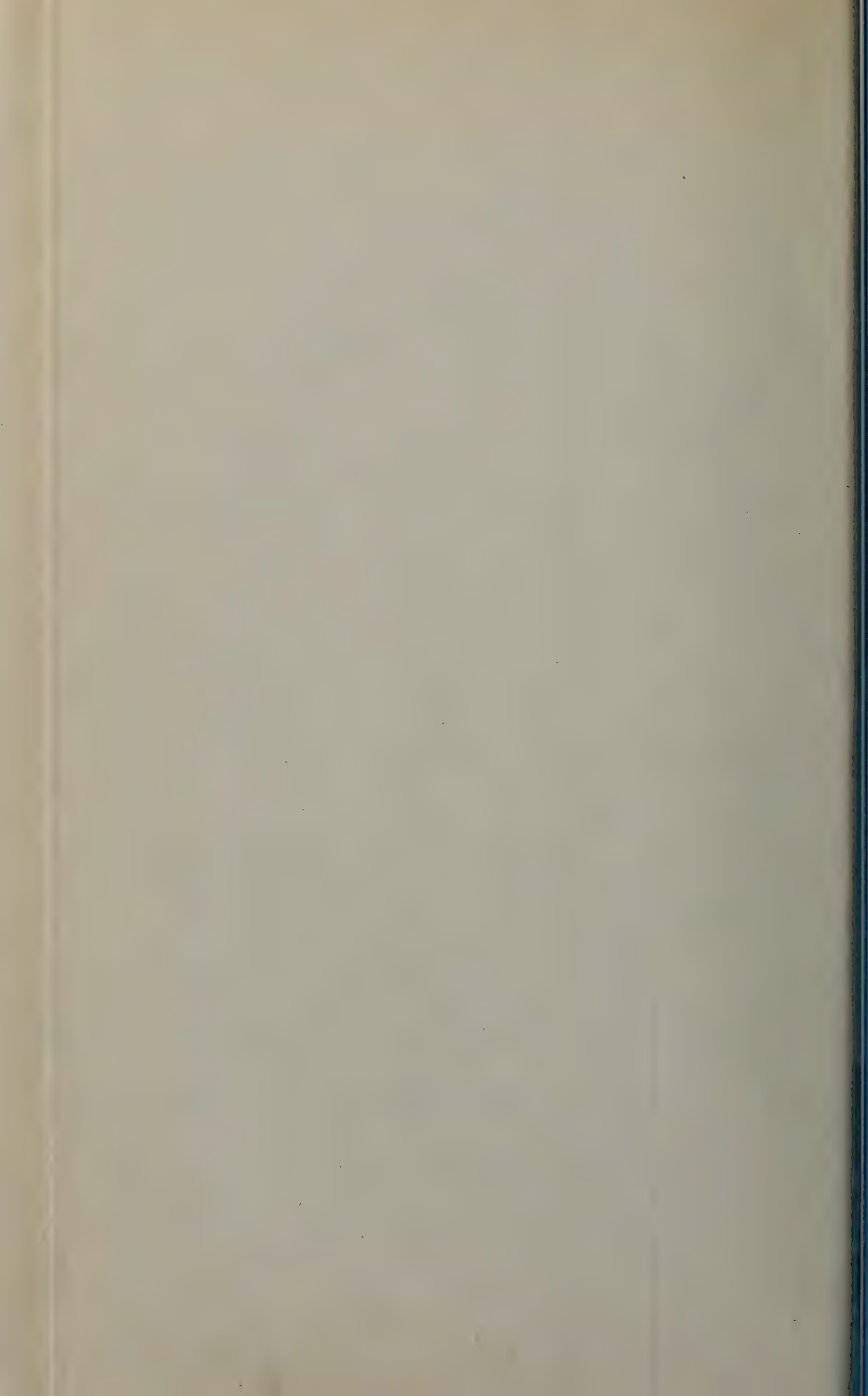
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UNION ROCK COMPANY  
( A Delaware Corporation )  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost & Additions, Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions, During 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<u>Rock and Gravel Plants:</u>												
Baldwin Park	\$ 299,068.65		\$ 299,068.65	\$ 290,052.15		\$ 290,052.15	\$ 9,016.50	4	\$ 2,254.13	\$ 6,762.37	\$ 299,068.65	\$ 292,306.28
Boulevard	\$ 252,251.37		\$ 252,251.37	\$ 234,301.55		\$ 234,301.55	\$ 17,949.82	1	\$ 17,949.82	-0-	\$ 252,251.37	\$ 252,251.37
Claremont	\$ 277,314.47		\$ 277,314.47	\$ 264,082.84		\$ 264,082.84	\$ 13,231.63	5	\$ 2,646.33	\$ 10,585.30		
Additions - 1936	24,514.97		24,514.97	4,129.11		4,129.11	20,385.86	8	2,451.50	17,934.36		
12-31-38							589.43	8	-0-	589.43		
	\$ 301,829.44		\$ 301,829.44	\$ 268,211.95		\$ 268,211.95	\$ 34,206.92		\$ 5,097.83	\$ 29,109.09	\$ 302,418.87	\$ 273,309.78
Durbin	\$ 249,457.30		\$ 249,457.30	\$ 249,457.30		\$ 249,457.30	-0-	0	-0-	-0-	\$ 249,457.30	\$ 249,457.30
Largo	\$ 146,408.81		\$ 146,408.81	\$ 140,505.87		\$ 140,505.87	\$ 5,902.94	6	\$ 983.82	\$ 4,919.12	\$ 146,408.81	\$ 141,489.69
Largo Mill	\$ 61,715.89		\$ 61,715.89	\$ 28,828.85		\$ 28,828.85	\$ 32,887.04	6	\$ 5,481.18	\$ 27,405.86		
Additions - 1937	1,987.41		1,987.41	132.50		132.50	1,854.91	4	397.48	1,457.43		
- 1937	796.08		796.08	33.17		33.17	762.91	3	199.02	563.89		
3-31-38							1,239.23	5	185.89	1,053.34		
12-31-38							630.95	8	-0-	630.95		
	\$ 64,499.38		\$ 64,499.38	\$ 28,994.52		\$ 28,994.52	\$ 37,375.04		\$ 6,263.57	\$ 31,111.47	\$ 66,369.56	\$ 35,258.09
Orange	\$ 224,482.67		\$ 224,482.67	\$ 210,925.45		\$ 210,925.45	\$ 13,557.22	1	\$ 13,557.22	-0-		
Additions - 1937	598.05		598.05	149.51		149.51	448.54	2	199.35	249.19		
12-31-38							296.31	8	-0-	296.31		
	\$ 225,080.72		\$ 225,080.72	\$ 211,074.96		\$ 211,074.96	\$ 14,302.07		\$ 13,756.57	\$ 545.50	\$ 225,377.03	\$ 224,831.53
Yeager	\$ 87,651.59		\$ 87,651.59	\$ 87,651.59		\$ 87,651.59	-0-	0	-0-	-0-	\$ 87,651.59	\$ 87,651.59
TOTAL - ALL PLANTS	\$1,626,247.26		\$1,626,247.26	\$1,510,249.89		\$1,510,249.89	\$118,753.29		\$ 46,305.74	\$ 72,447.55	\$1,629,003.18	\$1,556,555.63

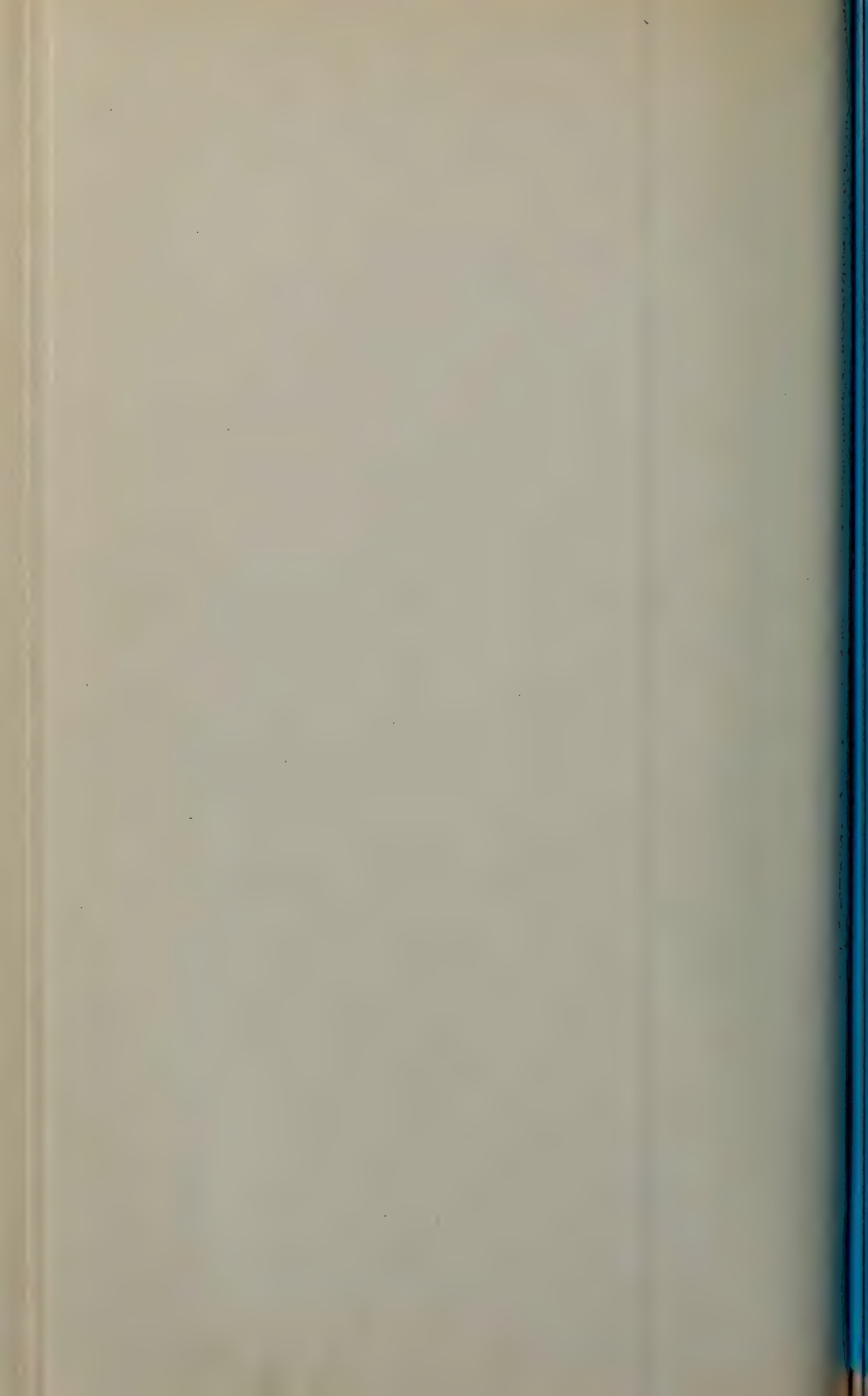
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UNION HOOK COMPANY  
(A Delaware Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

Particulars	Original Cost + Additions at or Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions during 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<b>Owners:</b>												
<b>Longton</b>	71,819.18		71,819.18	65,978.50		65,978.50	5,840.68	3	\$ 1,938.64	\$ 3,902.04		
Additions - 1938							234.24	10	15.62	218.62		
	71,819.18		71,819.18	65,978.50		65,978.50	6,074.92		\$ 1,954.26	\$ 4,120.66	\$ 72,053.42	\$ 67,932.76
<b>Compton</b>	6,519.33		6,519.33	651.93		651.93	5,867.40	9	\$ 651.93	\$ 5,215.47	\$ 6,519.33	\$ 1,303.86
<b>El Monte</b>	63,816.82		63,816.82	63,816.82		63,816.82	-0-	0	-0-	-0-	\$ 63,816.82	\$ 63,816.82
<b>Serrnosa</b>	10,558.00		10,558.00	10,558.00		10,558.00	-0-	0	-0-	-0-	\$ 10,558.00	\$ 10,558.00
<b>Home Junction</b>	62,491.45		62,491.45	60,455.35		60,455.35	2,036.10	2	\$ 1,018.05	\$ 1,018.05		
Additions - 1937	1,815.14		1,815.14	37.80		37.80	1,777.34	19	90.76	1,686.58		
2-28-38							2,564.59	20	106.85	2,457.74		
12-31-38							70.02	8	-0-	70.02		
	64,306.59		64,306.59	60,493.15		60,493.15	6,448.05		\$ 1,215.66	\$ 5,232.39	\$ 66,941.20	\$ 61,708.81
<b>Home Junction P. M.</b>	1,509.68		1,509.68	953.79		953.79	555.89	5	\$ 111.18	\$ 444.71	\$ 1,509.68	\$ 1,064.97
<b>Long Beach</b>	46,837.01		46,837.01	46,638.46		46,688.46	118.55	2	\$ 74.27	\$ 74.28		
Additions - 1937	1,082.30		1,082.30	105.23		105.23	977.07	5	\$ 180.40	\$ 796.67		
12-31-38							470.61	8	-0-	470.61		
	47,919.31		47,919.31	46,793.69		46,793.69	1,596.23		\$ 254.67	\$ 1,341.36	\$ 48,389.92	\$ 47,048.36
<b>Long Beach P. M.</b>	2,057.39		2,057.39	514.34		514.34	1,543.05	7 1/2	\$ 205.74	\$ 1,337.31	\$ 2,057.39	\$ 720.08
<b>Los Nietos</b>	54,667.07		54,667.07	52,384.08		52,384.08	2,282.99	2	\$ 1,141.48	\$ 1,141.51	\$ 54,667.07	\$ 53,525.56
<b>Serrill</b>	57,751.35		57,751.35	55,312.03		55,312.03	2,439.32	2	\$ 1,219.65	\$ 1,219.67		
Additions - 1936	2,152.37		2,152.37	107.62		107.62	2,044.75	23-3/4	\$ 86.10	\$ 1,958.65		
- 1937	2,367.91		2,367.91	-0-		-0-	2,367.91	20	\$ 118.40	\$ 2,249.51		
	62,271.63		62,271.63	55,419.65		55,419.65	6,851.98		\$ 1,424.15	\$ 5,427.93	\$ 62,271.63	\$ 56,843.80
<b>Sherman</b>	39,661.17		39,661.17	38,032.11		38,032.11	1,629.06	2	\$ 814.52	\$ 814.54		
Additions - 1936	3,609.47		3,609.47	909.48		909.48	2,699.99	3	\$ 721.89	\$ 1,978.10		
- 1937	162.42		162.42	10.15		10.15	152.27	6	\$ 24.36	\$ 127.91		
12-31-38							115.31	10	-0-	115.31		
	43,433.06		43,433.06	38,951.74		38,951.74	4,596.63		\$ 1,560.77	\$ 3,035.86	\$ 43,548.37	\$ 40,512.51
<b>Sherman P. M.</b>	771.05		771.05	495.36		495.36	275.69	5	\$ 55.13	\$ 220.56	\$ 771.05	\$ 590.49
<b>Slauson</b>	57,975.39		57,975.39	57,975.39		57,975.39	-0-	0	-0-	-0-		
Additions - 1936	2,225.22		2,225.22	370.87		370.87	1,854.35	8	\$ 232.52	\$ 1,631.83		
- 1937	323.32		323.32	47.18		47.18	276.34	7	\$ 40.44	\$ 235.90		
- 1937	225.69		225.69	18.81		18.81	206.88	9	\$ 22.57	\$ 184.31		
	60,750.02		60,750.02	58,412.45		58,412.45	2,337.57		\$ 285.53	\$ 2,052.04	\$ 60,750.02	\$ 58,697.98
<b>Slauson R. M.</b>	1,545.91		1,545.91	978.00		978.00	567.91	5	\$ 113.58	\$ 454.33		
Additions	205.67		205.67	25.71		25.71	179.96	8	\$ 20.57	\$ 159.39		
	1,751.58		1,751.58	1,003.71		1,003.71	747.87		\$ 134.15	\$ 613.72	\$ 1,751.58	\$ 1,137.86
<b>Wilmington</b>	61,251.56		61,251.56	52,812.71		52,812.71	8,438.85	4	\$ 2,082.93	\$ 6,355.92	\$ 61,251.56	\$ 54,895.64
<b>Wilmington R. M.</b>	948.76		948.76	379.51		379.51	569.25	6	\$ 94.88	\$ 474.37	\$ 948.76	\$ 474.39





UNION ROCK COMPANY  
(A Delaware Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

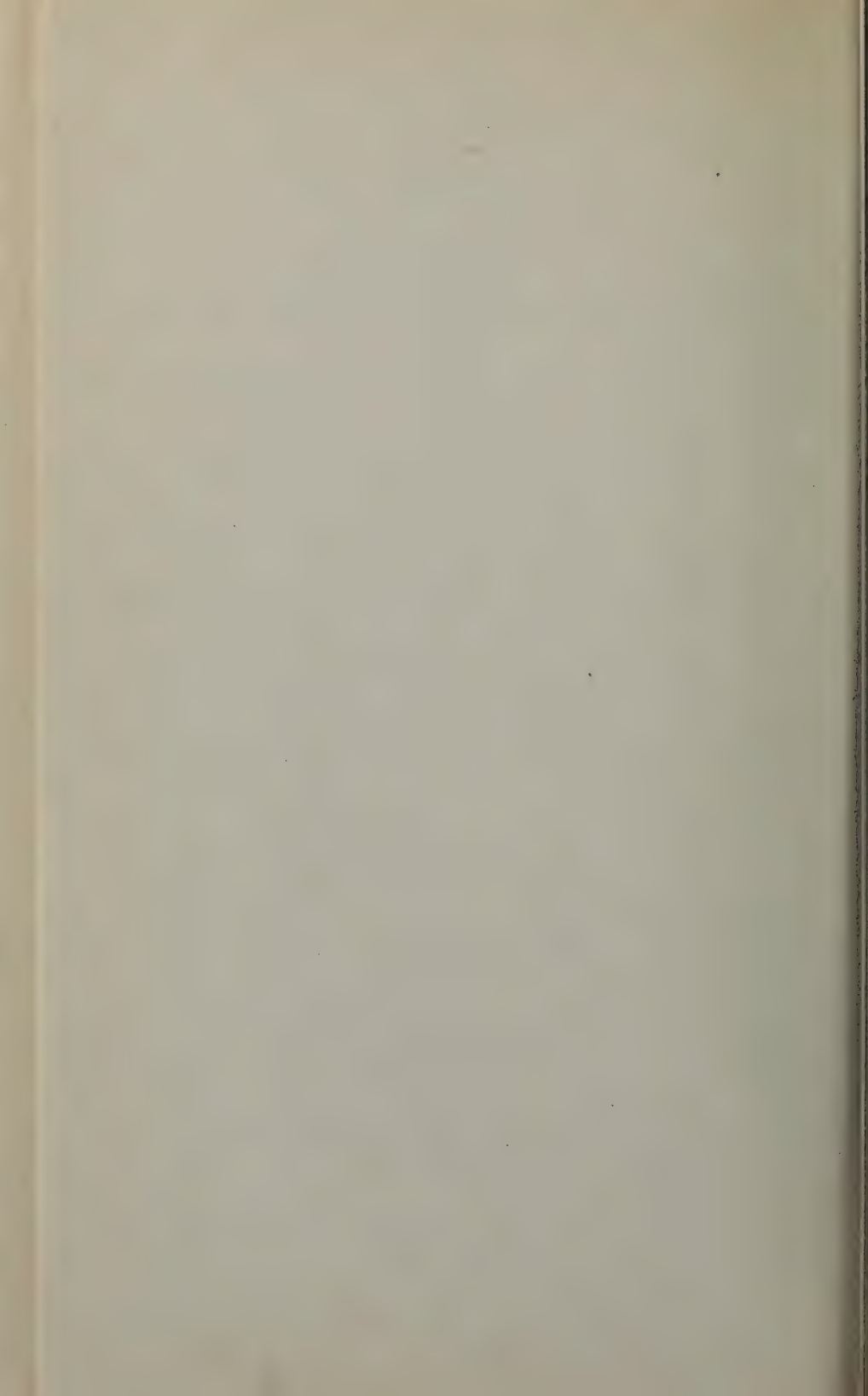
Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance Of Reserve	Balance of 12-31-37 Cost Remaining & Additions during 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
<u>Bunkers (Cont'd.)</u>												
Vineyard	\$ 4,977.61		\$ 4,977.61	\$ 4,977.61		\$ 4,977.61	-0-	0	-0-	-0-	\$ 4,977.61	\$ 4,977.61
Vineyard R. M.	\$ 4,165.48		\$ 4,165.48	\$ 2,352.47		\$ 2,352.47	\$ 1,813.01	5	\$ 362.60	\$ 1,450.41	\$ 4,165.48	\$ 2,715.07
TOTAL - ALL BUNKERS	\$ 563,494.12		\$ 563,494.12	\$ 516,949.51		\$ 516,949.51	\$ 49,999.38		\$11,535.06	\$ 38,464.32	\$ 566,948.89	\$ 528,484.57
<u>Buildings</u>												
El Monte Shop & Garage	\$ 16,066.47		\$ 16,066.47	\$ 11,190.79		\$ 11,190.79	\$ 4,875.68	11	\$ 443.24	\$ 4,432.44		
Additions - 1937	514.24		514.24	-0-		-0-	514.24	20	25.71	488.53		
6-30-38							187.09	10	9.35	177.74		
	\$ 16,580.71		\$ 16,580.71	\$ 11,190.79		\$ 11,190.79	\$ 5,577.01		\$ 478.30	\$ 5,098.71	\$ 16,767.80	\$ 11,669.09
<u>Miscellaneous Property</u>												
Railway Equipment	\$ 50,750.00		\$ 50,750.00	\$ 50,750.00		\$ 50,750.00	-0-	0	-0-	-0-	\$ 50,750.00	\$ 50,750.00
Largo-Kinoaid Railway	\$ 17,536.70		\$ 17,536.70	\$ 17,536.70		\$ 17,536.70	-0-	0	-0-	-0-	\$ 17,536.70	\$ 17,536.70
Miscellaneous Equipment	\$ 48,440.39		\$ 48,440.39	\$ 48,440.39		\$ 48,440.39	-0-	0	-0-	-0-	\$ 48,440.39	\$ 48,440.39
Inglewood Trackage	\$ 180.94		\$ 180.94	\$ 180.94		\$ 180.94	-0-	0	-0-	-0-	\$ 180.94	\$ 180.94
Largo-Kinoaid Tie Line	\$ 2,924.98		\$ 2,924.98	\$ 2,048.63		\$ 2,048.63	\$ 876.35	Various	\$ 122.52	\$ 753.83	\$ 2,924.98	\$ 2,171.15
Office Furniture and Equipment	\$ 15,881.51		\$ 15,881.51	\$ 15,881.51		\$ 15,881.51	-0-	0	-0-	-0-	\$ 15,881.51	\$ 15,881.51
Salvage	\$ 39,544.36	\$109.00	\$ 39,435.36	-0-		-0-	\$ 39,435.36	0	-0-	\$ 39,435.36	\$ 39,435.36	-
Total Miscellaneous Property	\$ 175,258.88	\$109.00	\$ 175,149.88	\$ 134,838.17		\$ 134,838.17	\$ 40,311.71		\$ 122.52	\$ 40,189.19	\$ 175,149.88	\$ 134,961.69
<u>Automotive Equipment</u>												
additions - 1936	\$ 135,107.00		\$ 135,107.00	\$ 135,107.00		\$ 135,107.00	-0-					
- 1937	3,363.65		3,363.65	2,224.79		2,224.79	1,138.86	1	1,138.86	-0-		
- 1938	2,310.27		2,310.27	472.95		472.95	1,837.32	1 Plus	1,155.14	682.18		
							1,786.75	2	178.05	1,608.70		
	\$ 140,780.92		\$ 140,780.92	\$ 137,804.74		\$ 137,804.74	\$ 4,762.93		\$ 2,472.05	\$ 2,290.88	\$ 142,567.67	\$ 140,276.79
TOTAL - ALL PROPERTY	\$2,522,361.89	\$109.00	\$2,522,252.89	\$2,311,033.10		\$2,311,033.10	\$219,404.32		\$60,913.67	\$158,490.65	\$2,530,437.42	\$2,371,946.77

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess of credits to depreciation reserve as per books, over depreciation as per schedules attached to tax returns:

For the years 1934, 1935, 1936 and 1937 as detailed for those years	62,353.08	62,353.08
For the year 1938 - as per books	29,476.47	31,437.20
- as per schedule above	60,913.67	31,437.20
Other adjustments, as detailed on schedule attached to 1936 return	4,705.26	4,705.26
Add: Leaseholds	\$132,280.03	\$2,398,157.39
	181,425.38	636,770.85
	\$313,705.41	\$2,853,502.86

TOTALS - as per balance sheet at December 31, 1938





T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T

INTERNAL REVENUE SERVICE

Los Angeles, Calif.

Office of the Collector

Sixth District of California.

In Replying Refer to – IT:LAL

March 9, 1939

Union Rock Company,  
(A Delaware Corporation)  
2730 South Alameda Street,  
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter of recent date, requesting for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)  
COLLECTOR.

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[223]

Treasury Department

# 1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$250,000 and a net income of not more than \$25,000 or no net income (except certain corporations specified in Instruction 2)

237

## For Calendar Year 1938

or Fiscal Year beginning 1938, and ended 1939

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

UNION ROCK LAND COMPANY

(Name)

2730 South Alameda Street,

(Street and number)

Los Angeles, Los Angeles, California.

(Post office)

(County)

(State)

Inactive

Kind of business

File

Code

Serial

No.

District

(Custodian's Name)

RECEIVED

3-15

Cash

Check

M. O.

First Payment

## ADJUSTED NET INCOME COMPUTATION

GROSS INCOME			
Item No.			
1. Gross sales (where inventories are an income-determining factor)	\$	Less returns and allowances	\$
2. Less cost of goods sold (from Schedule B-1)			
3. Gross profit from sales (item 1 minus item 2)			
4. Gross receipts (where inventories are not an income-determining factor)	\$		
5. Less cost of operations (from Schedule B-2)			
6. Gross profit where inventories are not an income-determining factor (item 4 minus 5)			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 18-1)			
8. Interest on obligations of the United States (from Schedule A, line 19 (a) (4). (See Instruction 18-2))			
9. Rents (See Instruction 18)			
10. Royalties (See Instruction 20)			
11. (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000.)			
(b) Gain or loss from sale or exchange of property other than capital assets (from Schedule D)			
12. Dividends (from Schedule E)			
13. Other income (state nature of income)			
14. Total income in Items 3, and 6 to 13, inclusive			\$
DEDUCTIONS			
15. Compensation of officers (from Schedule F)			\$
16. Salaries and wages (not deducted elsewhere)			
17. Rent (See Instruction 22)			
18. Repairs (See Instruction 24)			
19. Bad debts (from Schedule G)			
20. Interest (See Instruction 26)			
21. Taxes (from Schedule H). (Do not include Federal excess-profits tax)			
22. Contributions or gifts paid (from Schedule I)			
23. Losses by fire, storm, shipwreck, or other casualty or theft. (Submit schedule, see Instruction 29)			
24. Depreciation (from Schedule J)			
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31)			
26. Other deductions authorized by law (from Schedule K)			
27. Total deductions in Items 15 to 26, inclusive			
28. Net income for excess-profits tax computation (item 14 minus item 27)			\$ NONE
29. Less: Federal excess-profits tax. (See Instruction 33)			
30. Net income (item 28 minus item 29)			
31. Less: Interest on obligations of the United States (item 8, above)			
32. Adjusted net income (item 30 minus item 31)			\$ NONE

## EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

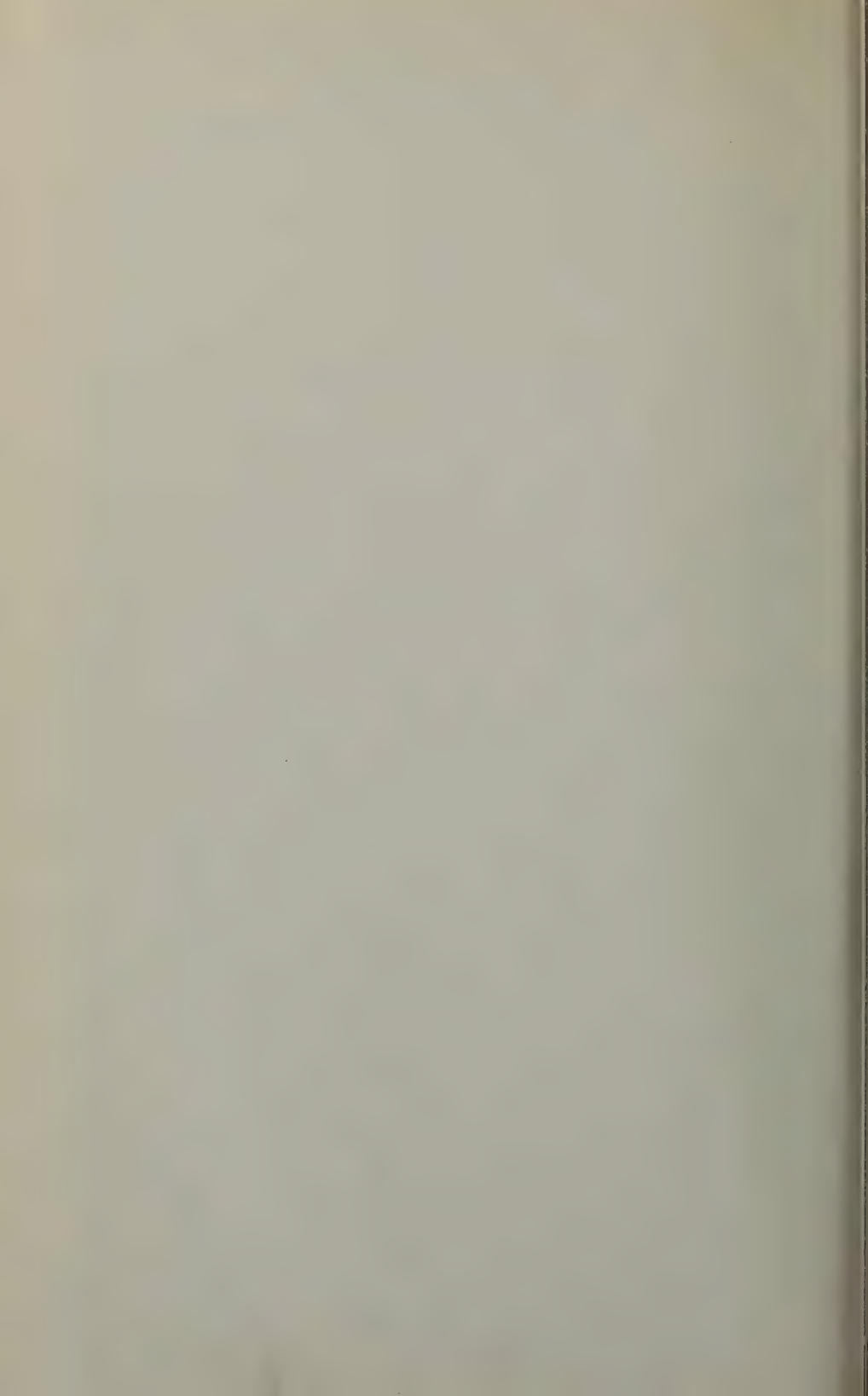
	Column 1	Col. 2 Rate	Column 3 Amount of Tax
33. Net income for excess-profits tax computation (item 28, above)	\$ NONE		
34. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1939 (or for year ended June 30, 1939, if your income tax fiscal year began in 1938 and ended on or after July 31, 1939)	\$		
35. 10 percent of item 34			
36. Dividends received credit (85 percent of col. 2, Schedule E, but not in excess of 85 percent of item 32, above)			
37. Balance subject to excess-profits tax (item 23 minus total of items 35 and 36)	\$		
38. Amount taxable at 6 percent (5 percent of item 34, but not more than item 37), and tax		6%	\$
39. Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax		12%	\$
40. Total excess-profits tax (total of item 38, col. 2, and item 39, col. 3)			\$ NONE

## INCOME TAX COMPUTATION

CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$25,000. (See Instruction 35)			
41. Adjusted net income (item 32, above)	\$ NONE		
42. Dividends received credit (85 % of col. 2, Schedule E, but not in excess of 85 % of item 41, above)			
43. Balance subject to income tax (item 41 minus item 42)	\$		
44. Portion of item 43 (not in excess of \$5,000); and tax at 12 1/2 percent		12 1/2%	\$
45. Portion of item 43 (in excess of \$5,000 and not in excess of \$20,000); and tax at 14 %		14%	\$
46. Portion of item 43 (in excess of \$20,000); and tax at 16 percent		16%	\$
47. Total income tax (total of 44, 45, and 46)			\$
48. Less: Credit for income tax paid to a foreign country or U. S. possession allowed a domestic corporation. (See Instruction 36)			
49. Balance of income tax (item 47 minus item 48)			\$ NONE
50. Excess-profits tax (item 40, above)			
51. Total tax due (item 49 plus item 50)			\$ NONE

NOTE—See form marked "DUPLICATE COPY" must be filed with this original return (38 will be assessed if duplicate copy is not filed).

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AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the Regulations issued thereunder.

S. H. Mitchell  
(State title)  
President

[Corporate Seal]

J. E. Gardner  
(State title)  
Secretary

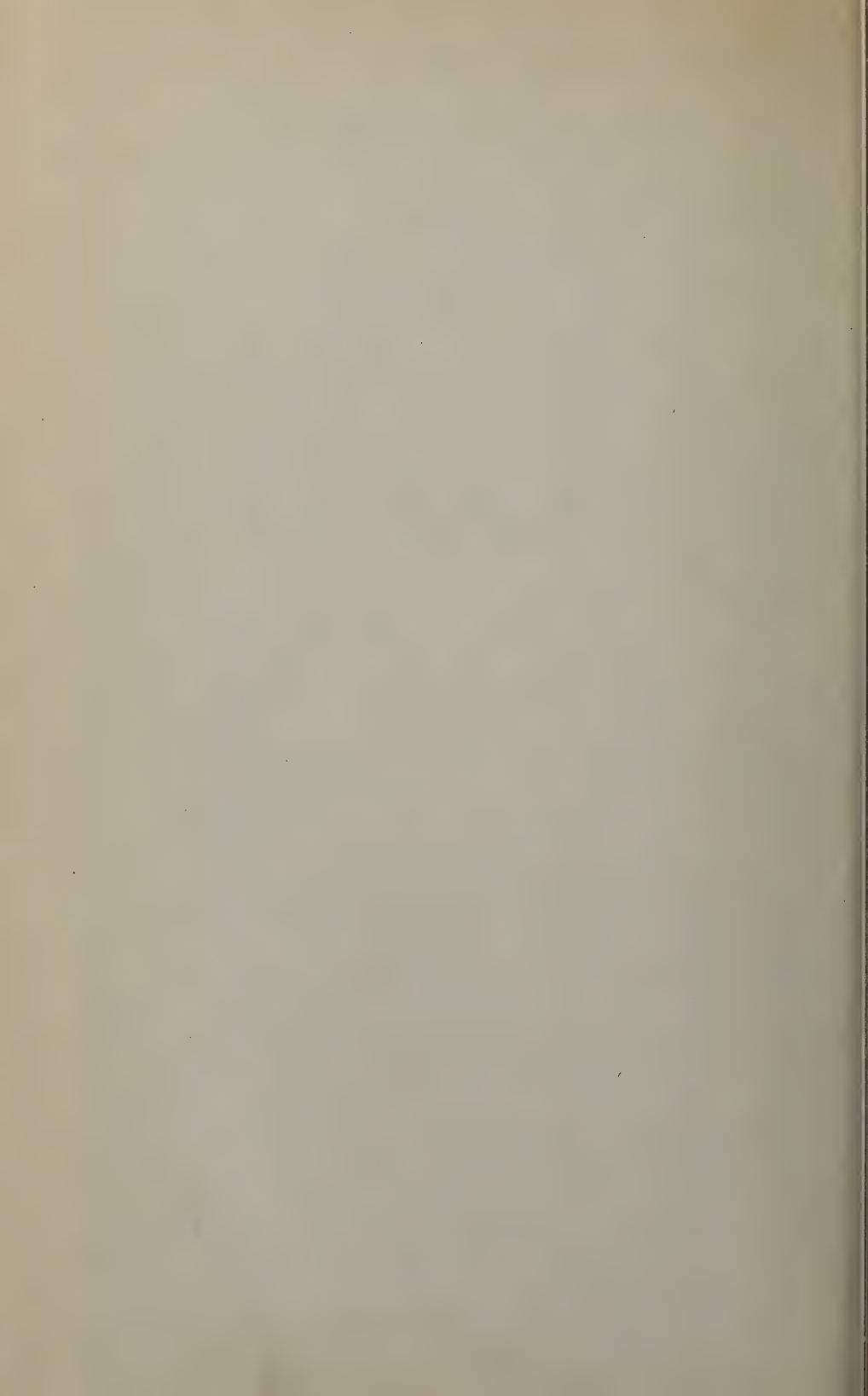
Subscribed and sworn to before me this 15th day of March, 193 .

[Notarial Seal] George Rollnick, Notary Public  
(Signature of officer (Title)  
administering oath)

GEORGE ROLLNICK

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[228]









Schedule A.—Reconciliation of Net Income and Analysis  
of Earned Surplus and Undivided Profits

1. Total distributions to stockholders  
charged to earned surplus during the  
taxable year..... \$.....
2. Contributions or gifts (excess over 5  
percent limitation).....
3. Federal income taxes.....
4. Income taxes of United States possessions  
or foreign countries if claimed as a  
credit in whole or in part in item 48,  
page 1.....
5. Federal taxes paid on tax-free covenant  
bonds .....
6. Special improvement taxes tending to in-  
crease the value of the property  
assessed .....
7. Replacements, renewals, and capital ex-  
penditures charged to expenses on the  
books .....
8. Insurance premiums paid on the life of  
any officer or employee where the cor-  
poration is directly or indirectly a  
beneficiary .....
9. Unallowable interest incurred in purchas-  
ing or carrying exempt interest obliga-  
tions .....

10. Excess of capital loss, if any, over amount allowable as a deduction in item 11 (a), page 1.....
11. Additions to surplus reserves (list each reserve separately):
- (a) .....
- (b) .....
- (c) .....
- (d) .....
12. Other unallowable deductions:
- (a) .....
- (b) .....
13. Adjustments for tax purposes not recorded on books (itemize):
- (a) .....
- (b) .....
14. Sundry debits to earned surplus (itemize):
- (a) .....
- (b) .....
- (c) .....
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule M)..... 6,017.70
- 
16. Total of lines 1 to 15..... \$ 6,017.70

17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule M)..... \$ 6,017.70

18. Adjusted net income (item 32, page 1).....

19. Nontaxable and partially exempt income:

(a) Interest on:

(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions .....

(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.. ..

(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$5,000 or less.....

(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$5,000 .....

(5) Obligations of instrumentalities of the United States.....

(b) Other nontaxable income (itemize):

(1) .....

(2) .....

20. Charges against surplus reserves deducted from income in the return (itemize):

(a) .....

(b) .....

21. Adjustments for tax purposes not recorded on books (itemize):

(a) .....

(b) .....

22. Sundry credits to earned surplus (itemize):

(a) .....

(b) .....

(c) .....

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23. Total of lines 17 to 22..... \$ 6,017.70

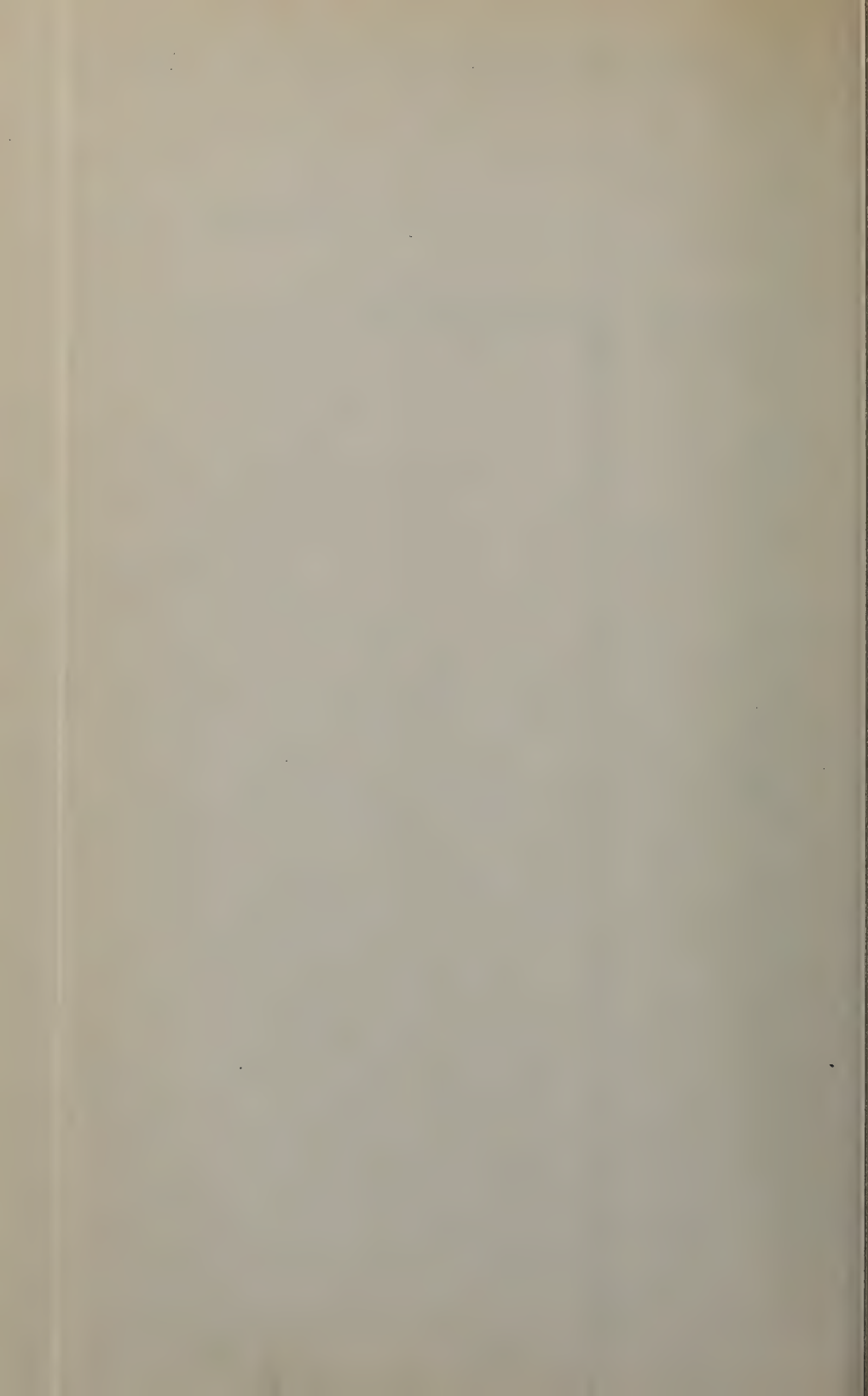
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Schedule J.—Depreciation. (See Instruction 30)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered	7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
		\$	\$	\$	\$			\$
SCHEDULE ATTACHED								
								\$
Total. (Enter as item 24, page 1)								\$



ASSETS	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
1. Cash		\$ 4,615.06		\$ 191.80
2. Notes and accounts receivable. <u>Accrued interest</u>				
Less reserve for bad debts. <u>Receivable</u>				13,493.50
3. Inventories:				
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(b) Obligations of the United States				
(c) Obligations of instrumentalities of the United States				
5. Other investments (items):				
<u>Stocks of subsidiaries</u>		292,237.18		292,237.18
6. Capital assets:				
(a) Depreciable assets (items):				
<u>Machinery and equipment</u>	\$ 28,713.67		\$ 28,713.67	
<u>Delivery equipment</u>	139,135.38		140,742.85	
Total depreciable assets	\$ 167,849.05		\$ 169,456.52	
Less reserve for depreciation	165,510.28	2,538.77	166,438.63	3,017.89
(b) Depletable assets	\$ 264,198.99		\$ 328,198.99	
Less reserve for depletion	20,754.22	243,444.77	20,762.38	308,436.61
(c) Land		120,790.88		113,255.40
7. Other assets (items): <u>Beneficial interest in real estate syndicates, bonds of affiliated company</u>	\$ 5,000.00		\$ 5,000.00	
		5,000.00		14,277.50
8. Total Assets		\$ 668,626.66		\$ 744,909.08
LIABILITIES				
9. Accounts payable <u>Parent company</u>		\$ 287,317.95		\$ 321,582.63
10. Bonds, notes, and mortgages payable:				
(a) With original maturity of less than 1 year		22,500.00	6,500.00	61,500.00
(b) With original maturity of 1 year or more	\$ 126.41		144.15	
11. Accrued expenses (items)		126.41		144.15
12. Other liabilities (items)				
13. Surplus reserves (items)				
14. Capital stock:				
(a) Preferred stock				
(b) Common stock		364,700.00		364,700.00
15. Paid-in or capital surplus		6,017.70		6,017.70
16. Earned surplus and undivided profits				
17. Total Liabilities		\$ 668,626.66		\$ 744,909.08

## QUESTIONS

1. Business classification. (See Instruction 16) Inactive which such return was filed
- If engaged in more than one of the business classifications indicated in Instruction 16, state on the two lines above the two businesses accounting for the greater part of the total receipts, and the approximate percentage accounted for by each of the two businesses. If engaged in retail trade, also indicate the number of stores as of the end of the taxable year.
2. State of incorporation November 12, 1924
3. State or country California
4. State collector's office where your return for the preceding year was filed Los Angeles
5. The corporation's books are in the care of Consolidated Hook Products Co.
- Located at 2730 South Alameda St., Los Angeles
6. Is the corporation a personal holding company within the meaning of section 402 of the Revenue Act of 1937? No If so, an additional return on Form 1120 H must be filed.
7. Is this a consolidated return of railroad corporations? No If so, procure from the collector of internal revenue for your district Form 881, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.
8. If this is not a consolidated return of railroad corporations, did you (a) own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? No If the answer is "yes," attach separate schedule showing with respect to each: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.
9. Was the income of this corporation included in a consolidated return for any prior year? No If so, give name and address of corporation which filed the consolidated return and the last year for
10. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes," give name and address of each predecessor business and the date of the change in entity.
- Upon such change, were any asset values increased or decreased? No If answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished, unless furnished heretofore.
11. Is this return made on the basis of cash receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income. Accrual
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. None If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock.
13. Did the corporation make a return of information on Forms 1099 and 1099 (see Instruction 10-1) for the calendar year 1937? No
14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No (If answer is "yes," attach schedule as required by Instruction 13-2.)

## AFFIDAVIT. (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that the return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1937 and the Regulations issued thereunder.

Subscribed and sworn to before me this 31st day of MARCH, 1939.

George Rollnick  
(Signature of officer, director, or cash)  
GEORGE ROLLNICK

NOTARY PUBLIC  
(Title)

CORPORATE SEAL  
(State title)

## AFFIDAVIT. (See Instruction 7)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 31st day of MARCH, 1939.

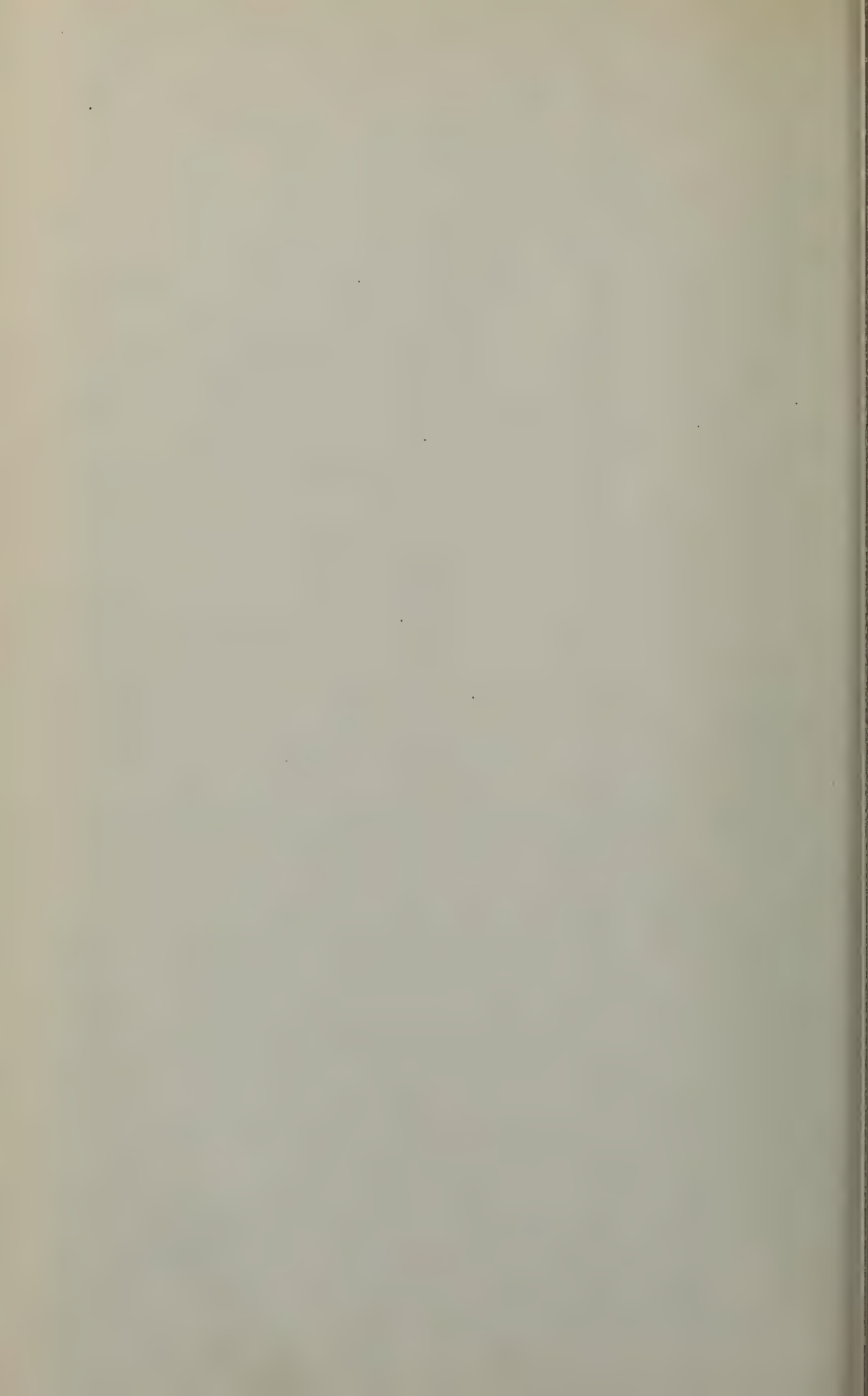
George Rollnick  
(Signature of officer, director, or cash)  
GEORGE ROLLNICK

(Title)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)





UNION ROCK LAND COMPANY

(A California Corporation)

Account Payable – Parent Company

Analysis of Changes During the Calendar Year 1938

Balance – December 31, 1938	\$324,582.63
Balance – December 31, 1937	287,317.95
	<hr/>
Net Decrease	\$ 37,264.68
	<hr/> <hr/>

ANALYSIS OF CHANGE

Charges:

Depreciation	\$ 2,698.23
Depletion	8.16
Interest accrued	908.74
	<hr/>
	\$ 3,615.13

Deficiency of depreciation provision – per books – under depreciation claimed for 1938 as income tax deduction \$ 1,063.32

Property sold  
and/or retired \$8,392.75

Accrued depreciation thereon 506.56 7,886.19

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\$ 10,438.00

## Credits:

Additions to property	\$2,464.74	
Cash received on account of condemnation of property	8,353.64	
Interest paid	891.00	
Interest accrued on bonds owned	13,493.30	
Payment on trust deed note	22,500.00	47,702.68
	<hr/>	<hr/>
Net Credit		\$ 37,264.68
		<hr/> <hr/>

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UNION ROCK LAND COMPANY  
(A California Corporation)

Item 25 – Depletion of Rock Deposits for the Calendar  
Year 1938

<u>Name of Property</u>	<u>Value Per Books</u>	<u>Depletion Prior Years</u>	<u>Depletion Year 1938</u>	<u>Total Depletion</u>
Boulevard	\$253,044.30	\$20,754.22	\$8.16	\$20,762.38
Hawkins-Gould	10,004.69			
McCarty	1,150.00			
	<hr/>	<hr/>	<hr/>	<hr/>
	\$264,198.99	\$20,754.22	\$8.16	\$20,762.38
	<hr/>	<hr/>	<hr/>	<hr/>

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UNION ROCK LAND COMPANY  
(A California Corporation)

Stock Owned in Other Corporations as at December 31,  
1938

<u>Company</u>	<u>Address</u>	<u>Percent of Stock Owned</u>	<u>Date Acquired</u>	<u>Tax Return Filed at</u>
Builders Crushed Rock Products Company	2730 So. Alameda St.	100.00%	1928-29	Los Angeles
Sunset Rock Products Company	2730 So. Alameda St.	40.00	1928	Los Angeles
Sunset Rock Products Company	2730 So. Alameda St.	40.00	1928	Los Angeles

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UNION ROCK LAND COMPANY  
(A California Corporation)  
Item 24 (Schedule J) Computation of Depreciation Claimed for the Year 1938

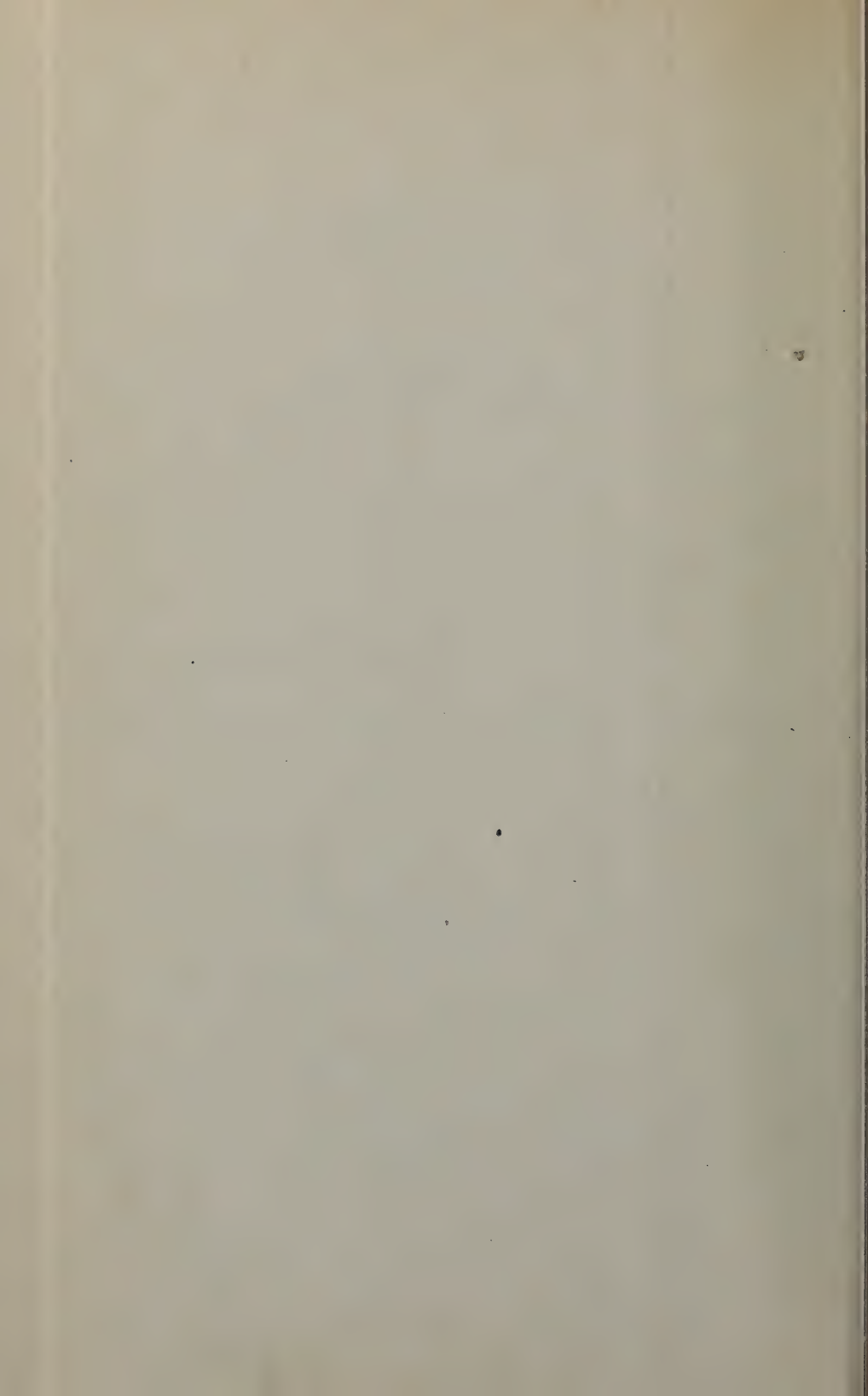
Particulars	Original Cost & Additions Net of Sales & Retirements to 12-31-37	Sales or Retirements Year 1938	Balance of 12-31-37 Cost	Accrued Depreciation Reserve at 12-31-37	Charges to Reserve for Sales & Retirement, Year 1938	Balance of Reserve	Balance of 12-31-37 Cost Remaining & Additions during 1938	Remaining Useful Life at 1-1-38 or at Date of Addition (Years)	Depreciation Claimed for 1938	Net Book Value of Property at 12-31-38	Gross Book Value of Property at 12-31-38	Total Reserve at 12-31-38
Glendale buildings and yard	\$ 28,713.67		\$ 28,713.67	\$ 20,900.95		\$ 20,900.95	\$ 7,812.72	11	\$ 710.25	\$ 7,102.47	\$ 28,713.67	\$ 21,611.20
Automotive equipment	\$137,020.11	\$857.27	\$136,162.84	\$136,138.20	\$506.56	\$135,631.64	\$ 531.20	0	\$ 531.20	-0-	\$	
Additions- 1937	2,115.27		\$ 2,115.27	108.85		108.85	2,006.42	1 plus	\$1,057.63	\$ 948.79		
- 1938							2,464.74	2	399.15	\$ 2,065.59		
	\$139,135.38	\$857.27	\$138,278.11	\$136,247.05	\$506.56	\$135,740.49	\$ 5,002.36		\$1,987.98	\$ 3,014.38	\$140,742.85	\$137,728.47
TOTAL - ALL PROPERTY	\$167,849.05	\$857.27	\$166,991.78	\$157,148.00	\$506.56	\$156,641.44	\$12,815.08		\$2,698.23	\$10,116.35	\$169,456.52	\$159,339.67

RECONCILIATION WITH BALANCE SHEET AS AT DECEMBER 31, 1938

Excess of credits to depreciation reserve as per books, over depreciation as per schedule attached to tax returns:

Years 1934, 1935, 1936 and 1937		\$ 8,162.28	8,162.28
Year 1938 - per books	\$1,634.91		
Year 1938 - per schedule above	2,698.23	1,063.32	1,063.32
Total per balance sheet as at December 31, 1938		\$ 3,017.89	\$169,456.52
			\$166,438.63

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T-R-E-A-S-U-R-Y D-E-P-A-R-T-M-E-N-T

INTERNAL REVENUE SERVICE

Los Angeles, Calif.

Office of the Collector  
Sixth District of California  
In Replying Refer to - IT:LAL

March 9, 1939

Union Rock Land Co.,  
2730 South Alameda Street,  
Los Angeles, California.

(A corp.)

Sir:

Receipt is acknowledged of your letter of recent date, requesting for the reasons therein given, extension of time within which to file your return of income for the calendar year 1938.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1939 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX THEREON TO BE DUE, you are hereby granted an extension of time to April 1, 1939.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

A copy of this letter must be attached to both the TENTATIVE AND COMPLETED returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "COMPLETED RETURN".

Respectfully,

Guy T. Helvering, COMMISSIONER.

By NAT ROGAN (Signed)  
COLLECTOR.

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[Endorsed]: Filed Nov. 6, 1943. [237]



[Title of District Court and Cause.]

STATEMENT OF TESTIMONY OF  
WILBUR E. THAIN

Wilbur E. Thain, a witness called on behalf of the debtor, being first duly sworn, testified on November 6, 1942, as follows:

I am auditor for Consolidated Rock Products Company, and am a Certified Public Accountant. I am certified first by the State of Utah and secondly by the State of California. I have been auditor for Consolidated Rock Products Co. since April 1, 1936. Just prior to that time I was on the staff of Lybrand, Ross Bros. & Montgomery, public accountants, as a senior accountant. I graduated from the Utah State College in June, 1914, with a degree of Bachelor of Science in Commerce with an accounting Major. I was appointed to the faculty of the same school as instructor in accounting and taught accounting from the fall of 1914 until the spring of 1918; then went into the army where I remained until the spring of 1919 as cost accountant in the U. S. Army Engineering Corps.

In the fall of 1920 I went to the University of Wisconsin as [238] instructor in accounting in the Extension Division. I was there for one year. In the fall of 1920 I returned to the Utah State College as assistant professor of accounting and business administration. I taught there from the fall of 1920 until the fall of 1927 and during the same period carried on a private professional and accounting practice.

In the fall of 1927 I came to Los Angeles and went to the staff of Arthur Anderson & Company, public account-

ants, as senior accountant. I was with them for one year and then went to the Edwards & Wildey as comptroller for that company where I stayed from 1928 until the middle of 1930.

In 1930 I went to Lybrand, Ross Bros. & Montgomery, public accountants, as a senior accountant, where I stayed until the end of March, 1936. On April 1, 1936, I went to Consolidated Rock Products Co. where I still am.

As a member of the Lybrand, Ross Bros. & Montgomery staff I made the annual audit of Consolidated Rock Products Co., and its subsidiary companies for the years 1930 through 1935.

At the time the company filed its petition under 77-B I went down to Consolidated as a representative of Lybrand's and assisted the accounting staff of the company to close the books and prepare the statements necessary to be filed at the date of bankruptcy. The work I did was substantially the same work I would have done if I had made an audit of the company.

I am familiar with all of the provisions of the operating agreements, that is, exhibits 8, 9 and 10 of the Stipulation of Facts. I prepared the chart designated "Chart Showing Percentages of Stock Ownership between Consolidated Rock Products Co. and its subsidiary companies." The chart is exhibit 7 of the Stipulation. I am familiar with that chart. I am familiar with the records from the date of consolidation to date. I have recently refreshed [239] my recollection with respect to those records.

I am familiar with the original accounting entries that were made when the operating agreements, exhibits 8, 9 and 10 to the stipulation were entered into. I have

reviewed those entries a good many times. Those entries were set up for each of the five so-called "Owning Companies," parties to the three agreements upon exactly the same cases.

Under the terms of these operating agreements the subsidiary companies were to transfer to Consolidated Rock Products Co. all current assets they owned, that is, cash, accounts receivable, notes receivable, inventories, the merchandise, supplies inventories, all prepaid items and certain miscellaneous stock and bond investments. Likewise the current liabilities of the subsidiary companies, consisting of accounts payable, accrued pay rolls, other accrued expenses, notes payable, contracts payable, purchase money obligations were all to be transferred to Consolidated and assumed by it. So on the books of Consolidated, to give effect to those agreements, Consolidated set up on its own books all of the current assets transferred to it by the subsidiary companies and set up on its own books as "liabilities" all of the current liabilities of the subsidiary companies to be assumed. The net difference between the assets and liabilities, if the assets were in excess, was credited to the subsidiary company in a current account which was set up with that subsidiary company. If the liabilities exceeded the assets, then there was a net debit or charge against the current account of the subsidiary company. Separate current accounts were set up for each subsidiary. I believe that covers it.

On the books of the subsidiary company, by describing one of them I cover all because the method was exactly the same. When the assets were transferred to Consolidated those assets accounts were closed out on the books



of the subsidiary. The [240] liabilities transferred to Consolidated were likewise closed out on the books of the subsidiary. If they transferred assets of greater value than the amount of liabilities, it resulted in a net debit or charge against an account which was set up on the books of the subsidiary company with Consolidated, called a "current account," resulting in a necessary charge for the net assets transferred. If the liabilities taken over by Consolidated exceeded the assets, then it resulted in a net credit to the current account with Consolidated Rock on the books of the subsidiary. The result was that the net debit or credit standing on the books of Consolidated Rock for each subsidiary was exactly equal to the net credit or debit standing in the current account with Consolidated Rock on the books of each subsidiary company.

I am familiar with the relations between Union Rock Land Company and Atlas Mixed Mortar Co. and Consolidated since the date of consolidation, at least in so far as the accounting and inter company practices are concerned. There was never any operating agreement by either of those companies with Consolidated. I think I would have known of it had there been any operating agreement. I have all of the operating agreements in my custody. In so far as the accounting treatment was concerned, Union Rock Land Company and Atlas Mixed Mortar Co. were treated exactly the same and handled exactly the same as the other companies with which Consolidated did have operating agreements. As of April 1,



1929, the day of consolidation, Union Rock Land Company transferred all of its current assets and current liabilities to Consolidated. The accounting treatment was exactly the same as for the other companies. As of December 31, 1930, Atlas Mixed Mortar transferred all of its current assets and current liabilities. In so far as the accounting is concerned, all seven of the subsidiaries were treated identically thereafter. When I refer to Consolidated [241] taking over the assets and assuming the liabilities of these subsidiaries I refer to the steps taken pursuant to the so-called consolidation that was effected in 1929 and 1930.

None of the fixed assets were transferred to Consolidated. By fixed assets I mean, plants, bunkers, equipment, all depreciable, property, fee lands and investment, if any, in stocks of subsidiary companies. These fixed assets included all of the depreciable and depletable assets and amortizable leaseholds.

I am familiar with the tables found on pages 7 and 8 of the stipulation. The tables set forth the depreciation, depletion and amortization taken upon the books of the debtor and the debtor's subsidiaries for tax purposes, for the respective corporations, for the year 1938.

At various times Consolidated made expenditures with respect to the fixed assets of the seven subsidiaries. That is a rather constant procedure. The company is constantly putting out money for the improvement of the properties of the subsidiaries. These are set upon the sub-

sidiaries' books to increase the subsidiaries' fixed assets. For example, if they should spend \$75,000 at the large plant, that would increase the value of the property standing upon the books of the Union Rock Company.

Referring to these tables I explain the difference between the columns "Depreciation of Investment of Subsidiary" and "Depreciation", "Depletion", or "Amortization of Expenditures of Consolidated" as follows: The first column, "Depreciation of Investment of Subsidiary": At the date of consolidation, April 1, 1929, there were certain property values standing upon the books of each of the subsidiary companies. When we reach the year 1938 there are still, subject to depreciation, some of those property values which the owning companies had in their property account at the date of consolidation. So the figures in this first column represent the amount of depreciation computed upon the property values as they existed at the date of consolidation.

The second column, "Depreciation of Expenditures of Consolidated": As stated, Consolidated has, ever since consolidation, made expenditures to improve the properties of the subsidiaries. The figures in the second column then represent the depreciation computed upon the property expenditures made by Consolidated since the date of consolidation. What I have said refers to the depletion and amortization of leaseholds.

After the original entries to which I have testified were made current entries were made on the books of

Consolidated and on the books of the subsidiaries with respect to the current depreciation and depletion of the properties and amortization of the leaseholds as follows: There is a monthly entry made, and in that entry Consolidated Rock on its own books sets up the amount of depreciation, depletion and amortization computed for the month as an expense in its own operating expense account. At the same time it passes a credit to each subsidiary company in a separate depreciation account for the amount of depreciation, depletion or amortization applicable to the properties of each company. The owning company, then, in turn, picks up on its books the amount of that depreciation, depletion or amortization, crediting its own reserve for depreciation, depletion or amortization and charging the amount to an account with Consolidated Rock, called the "Depreciation Account." These inter-company accounts are handled just the same as the current account, except only for our own convenience we keep the two separated. This is set up on the books of Consolidated as a liability to the subsidiary, in the amount of depreciation, depletion and amortization of the particular subsidiary's property. And the subsidiary sets up a receivable in the same amount from Consolidated. This is done pursuant to the terms of the operating agreements. What I have said applies both to the investments of the subsidiaries and the expenditures of Consoli- [243] dated. In setting up my current entries I made no differentiation whatever between the two. All of the amounts in these tables were set up on the books



of Consolidated and the subsidiaries as I have just described.

I am familiar with Exhibit 11 of the stipulation which is entitled "Modification of Operating Agreement." There was no change in the accounting procedure of the debtor or its subsidiaries at the time of the modification agreement. No change was ever made in the accounting procedure because of that modification agreement. There has never been any change in the accounting procedure for the inter-company accounting since it was originally established at the date of consolidation.

There was no change made in the accounting practices at the time of the Order of the Court of July 2, 1935, Exhibit 12 to the stipulation, placing the debtor in possession of the assets of the debtor and its two subsidiaries, Union Rock Company and Consumers Rock & Gravel Company, Inc. At the time the original petition was filed in this Court, May 24, 1935, the company's books were closed just as though it were the end of the fiscal year. All asset and liability accounts were brought into balance; all income and expense accounts were closed out to surplus and a new set of accounts was started as of May 25, 1935. This was done because of the bankruptcy proceedings. We set up a new set of accounts for all liabilities accruing after May 24, 1935. We opened up a set of books just as we might have done had another enterprise taken over these operations of these companies. The accounting procedure to which I have just referred continued throughout 1938.



(Cross Examination)

At all times title to the fixed assets of the subsidiaries stayed in the subsidiaries. Where Consolidated itself advanced funds for the acquisition of fixed assets to be used by the subsidiaries, [244] title to such additions or acquisitions was also in the subsidiaries. I may explain that this way: Considerable money was spent out at the Largo plant some years ago by a Union Rock Company owned plant. The total of these expenditures was transferred to the books of Union Rock Company and set up on the books of Union Rock as part of the value of the Union Rock Company's Largo plant rather than being set up on the books of Consolidated Rock. That is true in the case of each subsidiary.

Dated: this 3rd day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Assistant United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant.

[Endorsed]: Filed May 4 - 1944. [245]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer, June 23, 1943

The matter here requiring determination arises out of a claim filed by the United States against the debtor for an alleged deficiency assessed against it with respect to its 1938 income taxes. At the hearing upon the claim there was offered in evidence a stipulation covering virtually all of the facts which are to be taken into consideration in passing upon the claim. However the stipulation expressly provides that the matters set forth in the agreed statement, including the exhibits attached thereto, shall be deemed to be true only for the purpose of presenting and determining the question of law hereinafter mentioned. In addition, the debtor introduced oral testimony consisting of certain explanatory information furnished by its auditor.

The question of law requiring determination involves the right of the debtor to take certain deductions in connection with its income tax return for the calendar year 1938. These deductions represent amounts which the debtor asserts it was obligated to pay to certain of its subsidiaries and that in accordance with the arrangements made between them such compensation or rent was measured by the amount of the depreciation, depletion and amortization currently [246] accruing against said properties.

Following the exchange of briefs the court heard oral argument. At the outset of the argument the court reviewed and commented upon the contentions of counsel representing the respective parties. Thereupon counsel for the government stated:

“The court has made a most excellent and thorough analysis of the issues and there is nothing that I have to add at all about the issues as stated by the court, but it may be of advantage to look at some of the rules of construction of taxing statutes.”

Most of the oral argument which followed was that presented on behalf of the government, including colloquies between court and counsel.

Counsel for the debtor made a very brief reply, introducing his argument in the following language:

“If your Honor please, I have very little to say. I think that the extraordinarily clear, complete and fair statement of your Honor of the facts and the contentions of the parties is sufficient so far as the taxpayer is concerned and we are willing to stand on it.”

A transcript of the proceedings had at the oral argument has been filed and counsel may readily refer thereto. Nothing would be gained by repeating the analysis and comments made by the court at the outset of the oral argument. These in essence set forth the reasons for the conclusion reached by the court. The principal, if not the

sole, ground upon which the government contends [247] that the debtor was not entitled to take the deductions mentioned is that the amounts included therein constituted capital contributions from the debtor to its subsidiaries. We are unable to agree with such contention. We are persuaded that the position of the debtor is sound, and that it was entitled to be credited with the deductions taken in its return for the year 1938.

As heretofore noted it is still incumbent upon the parties to make a final computation respecting the amounts of such deductions.

#### MINUTE ORDER

For the reasons set forth in the memorandum of conclusions this day filed, it is ordered that counsel for the debtor shall prepare and submit an order in conformity therewith, serving a copy upon opposing counsel.

[Endorsed]: Filed Jun. 23, 1943. [248]



[Title of District Court and Cause.]

Re Claim of the United States for Additional Income  
Taxes for the Calendar Year 1938 in the Amount  
of \$25,112.72, Plus Interest

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Findings of Fact

This cause came on regularly for trial on November 6, 1942 and April 27, 1943 before the Honorable Harry A. Hollzer, sitting without a jury, the debtor appearing by its counsel Latham & Watkins by Dana Latham and R. C. Roeschlaub, and the United States, claimant herein, appearing by William Fleet Palmer, now deceased, formerly United States Attorney for the Southern District of California, and Leo V. Silverstein, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United [249] States Attorney for said District, and Samuel Taylor and Eugene Harpole, Special Attorneys for the Bureau of Internal Revenue; and evidence both written and oral having been received and considered by the Court and the Court being fully advised in the premises now makes the following findings of fact, to-wit:

### I.

The facts set forth in the "Stipulation of Facts," offered and received in evidence on behalf of the parties to this proceeding are true and correct and are hereby incorporated in these findings by reference.

## II.

The debtor, Consolidated Rock Products Co., and two of its subsidiaries, Consumers Rock & Gravel Company, Inc. and Union Rock Company, are corporations incorporated under the laws of the State of Delaware and at all times here pertinent have been duly qualified to do and have been transacting business in the State of California; their principal places of business being located in the City of Los Angeles, County of Los Angeles, State of California, within the Sixth Collection District of the State of California.

## III.

The debtor, Consolidated Rock Products Co., at all times has been and is both an operating and "holding" company. By the term "holding" is meant the ownership of all or a portion of the stock of various subsidiary companies engaged in the same type of business.

The relationship between the various corporations heretofore referred to is set forth in detail as Exhibit 7 to the Stipulation of Facts filed herein. In some cases there are two corporations bearing the same name, one being organized under the laws of the State of California and the other under the laws of the State of Delaware. Where this situation occurs, said companies will be distinguished one from the other by inserting after the name and [250] in parentheses the state of incorporation.

## IV.

Under date of July 15, 1929, debtor entered into an "operating agreement" with Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware),

ware), and Reliance Rock Company (Delaware). A copy of said operating agreement is attached to said Stipulation of Facts as Exhibit 9. In said agreement the debtor herein is described as the "operating company" and the various subsidiary companies as the "owning companies". Said agreement provided in part as follows:

(a) It is recited that economy and efficiency require the operation of the properties of the owning companies under one operating organization.

(b) The debtor acquired outright all current assets (personalty) of the "owning" (subsidiary) companies.

(c) The debtor assumed all the liabilities of the various owning companies except those based on the purchase of materials which liabilities the debtor could accept or reject at its option.

(d) Ownership of all fixed assets remained in the owning companies. Said operating agreement, however, vested "in the operating company for the term hereof the possession and custody" of said properties.

(e) The debtor (operating company) was authorized to make capital additions to the owner's properties. This was done from time to time by the debtor and these expenditures appear in Column 2 of the table included in Paragraph XVIII of the Stipulation of Facts.

(f) The debtor was required to pay all operating [251] expenses pertaining to the debtor's properties including:

"all other operating charges and expenses of the owning companies of every sort and nature,

including items of depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the owning companies and shall be paid to said owning companies as and when provided in Section 14 hereof, and in consideration thereof the operating company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties."

(g) The operating company was required at the conclusion of the agreement to return the capital properties belonging to the owning companies:

"in substantially the same condition as when received by the operating company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to."

(h) The operating agreement here under consideration was to remain in effect until terminated by thirty days' written notice by either the owning companies to the operating company or vice versa.

(i) Upon the termination of said operating agreement, the properties belonging to the owning companies were to be returned to them and:

"a financial adjustment shall be made as between the operating company and any such owning company or companies in accordance with the



current account of the parties on date of return of said properties and payment shall thereupon be made in accordance therewith."

## V.

Under date of July 15, 1929, debtor entered into a separate "operating agreement" with Builders Crushed Rock Products Company, in which the latter company was described as the "owning [252] company". Said agreement by its terms was substantially identical with that entered into between debtor and Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware) and Reliance Rock Company (Delaware), and heretofore referred to. A copy of said operating agreement referred to in this paragraph is attached to said Stipulation of Facts as Exhibit 8.

## VI.

On April 8, 1930, the debtor entered into an "operating agreement" with Sunset Rock Products Company, Inc. Said agreement by its terms was substantially identical with the two operating agreements of July 15, 1929 heretofore referred to. A copy of said agreement of April 8, 1930 is attached to said Stipulation of Facts as Exhibit 7.

## VII.

Immediately upon the execution of the three operating agreements heretofore herein referred to "current accounts" were established on debtor's books for each of said five "owning companies".

All current assets (personalty) owned by said owning companies were taken over by the debtor and credits to the full value thereof were set up on debtor's books for

the account of each owning company. At the same time the liabilities of each of the owning companies were taken over by the debtor and the amount thereof charged on the debtor's books against the owning company. If the owning company's liabilities so assumed exceeded in amount the assets so acquired there was a net charge against each owning company in the current account for each carried on the debtor's books. If said assets exceeded said liabilities a credit to each owning company was set up on the debtor's books.

### VIII.

Complementary entries were made on the books of each subsidiary or owning company. Appropriate credits and charges were [253] made to and against the debtor corporation. Where current assets were acquired by the debtor the accounts of the subsidiary reflecting said assets were closed out. The same was true with respect to the liabilities of the subsidiary taken over by the debtor.

### IX.

Where capital additions were made by the debtor to the owning company's fixed or capital assets, the amount thereof was charged on debtor's books to the current account of each subsidiary. Likewise, the owning companies on their books credited the debtor with such amounts.

### X.

At regular monthly intervals beginning at the date of each operating agreement, amounts representing depreciation, depletion and amortization of leaseholds covering both assets originally possessed by each owning company and capital expenditures made on said assets by the

debtor were determined. These items were set up by the debtor on its books as an expense of operation and a credit actually made to the current account of each owning company for said amounts representing depreciation, depletion and amortization applicable to said assets. The amount of these items appeared on the debtor's books at the close of each month from the beginning to the present, including each month of the year 1938 and at the close of the year 1938 as an unqualified liability to each subsidiary or owning company.

The books of account of each owning company for the same period also showed said amounts representing depreciation, depletion and amortization of leaseholds as a definite and unqualified account receivable and an asset due from the debtor.

## XI.

During this entire period and including the year 1938 the debtor and all of said owning companies (including those to be referred to in the succeeding paragraph hereof) maintained their [254] books of account and prepared and filed their Federal income tax returns on what is known as the "accrual" basis. Said entries were made and said accounting procedure heretofore specified was followed in accordance with the terms of the operating agreements heretofore referred to herein.

## XII.

The procedure heretofore referred to with respect to the fixed assets owned by the five operating companies covered by said operating agreements was followed exactly with respect to the assets of two other subsidiary companies of the debtor, namely, Union Rock Land Com-

pany, a wholly owned subsidiary of Union Rock Company (Delaware) and Atlas Mixed Mortar Company.

While there was no written operating agreement covering the ownership and use of the properties of said Union Rock Land and Atlas, the treatment accorded said companies and their assets was in all respects identical with that accorded the owning companies herein referred to.

In other words, all seven companies for all purposes were treated alike.

The conduct of the parties indicates that they intended to and did enter into a contract covering the ownership and use of properties of said Union Rock Land Company and Atlas Mixed Mortar Company substantially identical in terms with the written operating agreements with other named "owning companies" dated July 15, 1929 and April 8, 1930, and heretofore referred to.

### XIII.

Under date of February 16, 1933, debtor herein entered into an agreement with Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware) and Reliance Rock Company (Delaware), which agreement was termed a "Modification of Operating Agreement". A copy of said agreement is attached to the Stipulation of Facts as Exhibit 11.

No similar agreement was ever entered into between the [255] debtor and Builders Crushed Rock Products company, Sunset Rock Products Company, Inc., Union Rock Land Company, or Atlas Mixed Mortar Company.



Said so-called modification agreement of February 16, 1933 provided in part:

(a) Depreciation (including depletion and amortization) was to be actually credited only upon the termination of the agreement. Its amount was then to be determined by appraisers to be appointed by the contracting parties and was to be based on values and rates determined as of April 1, 1929 and each succeeding year during the life of the operating agreement.

(b) The term of said operating agreement was to be five years from February 16, 1933, except that:

“operating company is hereby given the option to extend said operating agreement as hereby modified for a further term of five years upon the same terms and conditions provided that notice of its intention to extend said term is given to each of the owning companies within one year of the date of expiration of the original term in this paragraph specified.”

No notice of an extension as heretofore referred to was ever given by debtor or any other person, nor was any agreement with respect thereto entered into.

#### XIV.

Said so-called “Modification of Operating Agreement” heretofore referred to was ignored for all purposes by all the parties thereto. No change of any kind or nature was made by any party to said agreement in the accounting procedure theretofore established and heretofore referred to. The debtor continued to credit amounts rep-

resenting depreciation, depletion and amortization of leaseholds monthly to each subsidiary exactly in accordance with the provisions of the original operating agreements. [256]

When the five year term provided for by said so-called "modification" expired, no appraisers were appointed and no effort was made to determine the debtor's liability for depreciation as provided therein, and nothing has been done with respect thereto up to the present.

### XV.

The conduct of the parties to said modification of operating agreement of February 16, 1933 indicates that they intended to and did in fact immediately rescind said agreement by complete abandonment of its terms. Said agreement for the purpose of this proceeding never became operative.

### XVI.

On May 24, 1935 petitions for the reorganization under Section 77B of the Bankruptcy Act of the debtor and its two subsidiaries, Union Rock Company (Delaware) and Consumers Rock & Gravel Company, Inc. (Delaware) were filed in this Court. By appropriate order the debtor was temporarily continued in possession of the assets of all three corporations.

No petition involving receivership, bankruptcy or reorganization has ever been filed covering the remaining so-called "owning companies", namely, Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company and Atlas Mixed Mortar Company, or Union Rock Land Company.

### XVII.

Under date of July 2, 1935, the Court, by appropriate order, continued the debtor in possession of all properties, including those of the two subsidiaries just named, Consumers and Union, until further order of the Court. No contrary order has been entered by the Court.

Said order of July 2, 1935 in substance authorized the debtor to continue existing business and financial agreements, arrangements and relations between the debtor and its subsidiaries [257] "to the extent that they may be necessary or advisable in order that the properties of the debtor and its subsidiary corporations may be operated as nearly as possible under the same policy of management." Said order of July 2, 1935 has remained in full force and effect.

### XVIII.

Upon the filing of the petition for reorganization heretofore referred to the books of account of the debtor and said Union and Consumers companies were closed as if May 24, 1935 were the end of the fiscal year of said corporations. New accounts were thereupon set up beginning May 25, 1935.

Prior accounting practices were followed exactly with respect to all of said "owning companies". The current accounts of said owning companies and the debtor were credited and debited monthly with amounts representing depreciation, depletion and amortization, all as heretofore set forth in detail.

The procedure just referred to has been followed consistently to the present. Statements duly filed with this Court show the operations of the debtor have consistently

reflected the procedure herein referred to. In so conducting its affairs the debtor has complied with the provisions of the order of this Court of July 2, 1935 heretofore referred to.

### XIX.

In its Federal Corporation Income and Excess-Profits Tax Return for the calendar year 1938, attached to the Stipulation of Facts herein as Exhibit 6, the debtor, on Line 22 thereof, deducted an item entitled "Expenses paid for subsidiaries—\$484,214.40". Said amount included an item entitled "Expenses paid for subsidiaries" totaling \$215,917.64, representing depreciation, depletion and amortization with respect to the properties of said so-called "owning companies". The details with respect to said amount are set forth in paragraph VIII of the Stipulation of Facts filed herein. Said amounts were computed in accordance with the provisions of the various [258] operating agreements dated July 15, 1929 and April 8, 1930, and set up on the books of the debtor as expenses of operation, and on the books of the owning companies as accounts receivable, all as heretofore herein set forth.

### XX.

The United States, the claimant herein, has disallowed as deductible expenses to the debtor all of said amount of \$215,917.64 and adjusted debtor's taxable income for the year 1938 accordingly. Based upon said adjustment, the United States, on November 28, 1941, assessed against the debtor herein additional income taxes for the calendar year 1938 in the amount of \$25,112.72, plus interest thereon to November 28, 1941 in the amount of \$4,071.70.



XXI.

On March 9, 1942 this Court entered an order granting leave to the United States to file its claim in this proceeding for said alleged 1938 income tax deficiency together with interest thereon. Said claim was filed by the United States on March 27, 1942, objections to the allowance of said claim either in whole or in part were duly filed by the debtor.

XXII.

The Stipulation of Facts filed herein provided in part as follows:

"VII.

"The said deficiency notice, Exhibit 1, indicates that the said deficiency of \$25,112.72 was determined by making the following adjustments to net income:

"Adjustments to Net Income

"Net income (loss) as disclosed by return		(\$105,532.14)
"Unallowable deductions:		
"(a) Capital loss	\$ 18,341.97	
"(b) Expenses paid for subsidiaries	215,917.64	
Forward	\$234,259.61	(\$105,532.14)
		[259]
Forward	\$234,259.61	(\$105,532.14)
"(c) Depreciation	23,690.83	
		257,950.44
"Total		\$152,418.30
"Additional deduction:		
"(d) Capital stock tax		152.00
"Net income adjusted		\$152,266.30

## “VIII.

“It is stipulated that adjustment (d) pertaining to the capital stock tax is correct.

## “IX.

“It is stipulated that adjustment (a) pertaining to capital loss is correct.

## “X.

“It is stipulated that the correct figure for adjustment (c) pertaining to depreciation is \$20,388.62. and that adjustment (c), with this figure substituted for the \$23,690.83, is correct.

## “XI.

“It is stipulated that the taxpayer suffered a loss through flood during the year 1938 in the amount of \$15,754.92; that said loss is not reflected in its return, Exhibit 6, and that in determining the amount of tax due, if any, from the debtor for the taxable year 1938, said loss shall be allowed.”

## XXIII.

Said Stipulation of Facts filed herein also provided that the hearings heretofore had in connection with the claim of the United States and the decision of the Court shall cover only questions of law raised by the claim of the United States. It has not been conceded by the claimant that if the Court should find that the debtor is entitled to deduct as expenses of operation [260] depreciation, depletion and amortization sustained by the owning companies with regard to their properties, that the amounts of such depreciation, depletion and amortization have been correctly computed and determined by the

debtor. It has been further stipulated between said parties that if the Court should determine that the debtor is entitled to deduct, in determining its net taxable income for the calendar year 1938, depreciation, depletion and amortization of leaseholds sustained with respect to the properties of the so-called owning companies pursuant to the operating agreements heretofore referred to, that the amount of said deductions shall either be agreed to between the parties, or if the parties cannot agree thereto, shall be determined by this Court in a subsequent proceeding.

#### XXIV.

In adopting the within findings, the Court in no manner fixes the amount of depreciation, depletion and amortization to which the debtor may be entitled. Likewise the Court in no manner approves the bookkeeping or accounting records of the debtor either as to the methods employed or the figures or amounts appearing therein. All the within findings are made subject to the qualifications set forth in finding No. XXIII.

#### Conclusions of Law

##### I.

The debtor entered into binding operating agreements both oral and written with its seven subsidiary companies, namely, Consumers Rock & Gravel Company, Inc. (Delaware), Union Rock Company (Delaware), Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company (Delaware), Atlas Mixed Mortar Company, and Union Rock Land Company. Said agreements in substance are identical with the provisions of the agreement of July 15, 1929

entered into between debtor and Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Deleware).

## II.

Said operating agreements were in effect prior to and [261] during and subsequent to the calendar year 1938. In so conducting its affairs during the calendar year 1938 the debtor not only complied with the provisions of said operating agreements, but also with the order of this Court dated July 2, 1935.

## III.

The so-called "Modification of Operating Agreement" dated February 16, 1933, and to which the debtor, Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), Reliance Rock Company (Delaware), were parties was immediately rescinded and abandoned by mutual agreement of all the parties, and for the purposes of this proceeding never had any effect during 1938 or at any other time on the operating agreements between the debtor herein and the subsidiary companies heretofore referred to.

## IV.

The debtor is entitled, in determining its net taxable income for the calendar year 1938, to deduct as expenses of operation the depreciation, depletion and amortization of leaseholds sustained by said seven owning companies heretofore referred to, the properties of which were used and operated during said calendar year 1938 by the debtor herein in connection with its business.

In determining the amount of said depreciation, depletion and amortization of leaseholds no account shall be



given to said so-called "Modification of Operating Agreement" dated February 16, 1933 and heretofore referred to. Instead, said depreciation, depletion and amortization of leaseholds shall be determined in accordance with the provisions of the Federal Internal Revenue Code and the applicable Regulations issued thereunder.

V.

The amount of the deduction to which the debtor herein is entitled, as heretofore in these conclusions of law set forth, shall be determined by the parties hereto by agreement, if possible, and submitted to this Court together with an actual computation of said [262] income and excess-profits tax liability of the debtor for the calendar year 1938, if any. If the parties fail to agree respecting such amount within a reasonable time, then a further hearing should be held to determine the same.

VI.

Regardless of all other considerations, the income tax liability of the debtor for 1938 shall be computed in accordance with paragraphs VII, VIII, IX, X and XI of the Stipulation of Facts entered into by the parties hereto and heretofore referred to.

Dated: October 12 - 1943.

H. A. Hollzer  
Judge

Approved as to form:

-----  
Counsel for Claimant.

[Endorsed]: Filed Oct. 12, 1943. [263]

In the District Court of the United States  
Southern District of California  
Central Division

No. 25816-H

In Proceedings for the Reorganization of a Corporation

In the Matter of CONSOLIDATED ROCK PROD-  
UCTS CO., a Delaware corporation,

Debtor

UNION ROCK COMPANY, a Delaware corporation,  
Subsidiary

CONSUMERS ROCK & GRAVEL COMPANY, INC.,  
a Delaware corporation,

Subsidiary.

### ORDER

The United States of America having, pursuant to order of this Court dated March 9, 1942, granting leave so to do, filed on March 26, 1942, its claim against debtor herein for federal income taxes for the calendar year 1938 in the amount of \$25,112.72, plus interest thereon to November 28, 1941, in the amount of \$4,071.70; objections to the allowance of said claim, either in whole or in part having been duly filed by the debtor; the matter having come on regularly for trial on November 6, 1942 and April 27, 1943 before this Court; evidence both oral and written having been received by [264] the Court; it having been stipulated by the parties that the hearings had in connection with said claim and the decision of the Court should cover only questions of law raised by the claim of the United States; it having further been stipulated that if the Court should determine that

debtor is entitled to deduct, in determining its net taxable income for the calendar year 1938, amounts equal to the depreciation, depletion and amortization of leaseholds sustained with respect to the properties of the so-called owning companies, the amount of said deduction shall either be agreed to between the parties, or, if the parties cannot agree thereto, shall be determined by this Court in a subsequent proceeding; this Court having made its finding, among others, that the debtor is so entitled to deduct, in determining its net taxable income for the calendar year 1938, amounts equal to the depreciation, depletion, and amortization of leaseholds sustained with respect to the properties of the so-called owning companies; findings of fact and conclusions of law, including the findings above stated, having been made by the Court and entered in this matter of October 12, 1943; and good cause appearing therefor,

It Is Hereby Ordered, Adjudged, and Decreed:

(1) That debtor entered into binding operating agreements both oral and written with its seven subsidiary companies, namely, Consumers Rock & Gravel Company, Inc. (Delaware), Union Rock Company (Delaware), Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company (Delaware), Atlas Mixed Mortar Company, and Union Rock Land Company. Said agreements in substance are identical with the provisions of the agreement of July 15, 1929 entered into between debtor and Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware).

(2) Said operating agreements were in effect prior to and during and subsequent to the calendar year 1938.

In so conducting [265] its affairs during the calendar year 1938 the debtor not only complied with the provisions of said operating agreements, but also with the order of this Court dated July 2, 1935.

(3) The so-called "Modification of Operating Agreement" dated February 16, 1933, and to which the debtor, Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware), were parties was immediately rescinded and abandoned by mutual agreement of all the parties, and for the purposes of this proceeding never had any effect during 1938 or at any other time on the operating agreements between the debtor herein and the subsidiary companies heretofore referred to.

(4) The debtor is entitled, in determining its net taxable income for the calendar year 1938, to deduct as expenses of operation the depreciation, depletion and amortization of leaseholds sustained by said seven owning companies heretofore referred to, the properties of which were used and operated during said calendar year 1938 by the debtor herein in connection with its business.

In determining the amount of said depreciation, depletion and amortization of leaseholds no account shall be given to said so-called "Modification of Operating Agreement" dated February 16, 1933 and heretofore referred to. Instead, said depreciation, depletion and amortization of leaseholds shall be determined in accordance with the provisions of the Federal Internal Revenue Code and the applicable Regulations issued thereunder.



(5) The amount of the deduction to which the debtor herein is entitled shall be determined by the parties hereto by agreement, if possible, and submitted to this Court together with an actual computation of said income and excess-profits tax liability of the debtor for the calendar year 1938, if any. If the parties fail to agree respecting such amount within a reasonable time, then a further hearing should be held to determine the same.

(6) Regardless of all other considerations, the income [266] tax liability of the debtor for 1938 shall be computed in accordance with paragraphs VII, VIII, IX, X and XI of the Stipulation of Facts entered into by the parties hereto and heretofore referred to.

Dated: October 30, 1943.

H. A. Hollzer,  
District Judge

Approved as to form:

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Counsel for Claimant.

Judgment entered Oct. 30, 1943. Docketed Nov. 2, 1943. C. O. Book 21, Page 666-1/6. Edmund L. Smith, Clerk, by L. Wayne Thomas, Deputy.

[Endorsed]: Filed Oct. 30, 1943. [267]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order entered in the above entitled proceeding on the 30th day of October, 1943, directing that the debtor above named be allowed to deduct from its gross income for the calendar year 1938 the amounts equal to the depreciation, depletion and amortization of leaseholds sustained with respect to the properties of certain so-called owning companies, its subsidiaries, in computing its said taxable net income for said year, 1938.

Dated: this 27th day of November, 1943.

CHARLES H. CARR,  
United States Attorney,  
E. H. Mitchell,  
Asst. United States Attorney,  
EUGENE HARPOLE,  
Special Attorney,  
Bureau of Internal Revenue

By Eugene Harpole  
Attorneys for United States of America.

[Endorsed]: Filed Nov. 27, 1943. [268]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY UPON APPEAL FROM ORDER OF OCTOBER 30, 1943.

To Consolidated Rock Products Co., Union Rock Company, Consumers Rock & Gravel Company, Inc., and to their attorneys, Latham & Watkins,

You and Each of You will please take Notice under the provisions of Rule 75 (a) of the Rules of Civil Procedure for the United States District Courts that the Petitioner and Appellant intends to rely upon the following points in the appeal of the above-entitled case:

I

The District Court erred in entering its Order of October 30, 1943, whereby the debtor, Consolidated Rock Products Co., is allowed to deduct the depletion, depreciation and amortization of leaseholds sustained by its subsidiaries from its own gross income in determining the taxable net income for the calendar year 1938, for the reason that none of the properties upon which such depletion, depreciation and amortization is claimed belonged to the taxpayer at any time during the calendar [269] year of 1938.

II

The District Court erred in its Order of October 30, 1943, in holding that the "Modification of Operating

Agreement" dated February 16, 1933, and to which Consolidated Rock Products Company, the debtor, Union Rock Company (Delaware), Consumer's Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware) were parties, was immediately rescinded and abandoned by the mutual agreement of all the parties and had no effect at any time on the previously existing operating agreement between the debtor and its subsidiaries, for the reason that the evidence before the Court disclosed that said Modification of Operating Agreement was duly executed by the parties thereto and there was no competent evidence before the Court of its rescission.

### III

The District Court erred in its Order of October 30, 1943, in failing to hold that no obligation on the part of the debtor, Consolidated Rock Products Company, to meet the depletion, depreciation or amortization of leaseholds sustained by the so-called owning companies had accrued during the taxable year 1938.

### IV

The District Court erred in its Order of October 30, 1943, in failing to hold that any obligation on the part of the debtor, Consolidated Rock Products Company, to meet the depletion, depreciation or amortization of leaseholds sustained by the so-called owning companies represented an additional investment in the capital stock of



those companies and was not an accrued or deductible business expense to the debtor.

Dated: this 4th day of May, 1944.

CHARLES H. CARR, U. S. Attorney,  
E. H. MITCHELL, Asst. U. S. Attorney,  
EUGENE HARPOLE, Special Attorney,  
Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Appellant.

[Endorsed]: Filed May 4, 1944. [270]

[Title of District Court and Cause.]

APPELLANT'S AMENDED DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL FROM  
ORDER OF OCTOBER 30, 1943.

To the Clerk of the District Court of the United States  
for the Southern District of California, Central  
Division:

You are requested to include the following in the  
Record on Appeal from the Order of the District Court  
of October 30, 1943 herein:

1. Petition of Debtor for Arrangement.
2. Order Approving Petition for Arrangement.
3. Order of July 2, 1935.
4. Petition for Leave to file Claim for Deficiency in  
1938 Income Taxes.
5. Order granting Leave to file a Claim for Deficiency  
in 1938 Income Taxes.
6. Tax Claim of the United States for a Deficiency  
in 1938 Income Taxes. [271]
7. Objection to Claim of United States for additional  
1938 Income Taxes.
8. Stipulation of Facts Filed November 6, 1942.
9. Statement of Testimony of Wilbur E. Thain, given  
on November 6, 1942.
10. Memorandum of Conclusions of the District  
Judge, dated June 23, 1943.
11. Findings of Fact and Conclusions of Law.
12. Order of October 30, 1943.
13. Notice of Appeal.

14. Statement of Points upon which Appellant will rely on Appeal.

15. Order extending Time to docket Cause on Appeal.

16. This Amended Designation.

17. Stipulation for Consolidation of Records.

18. Certificate of the Clerk to Transcript of Record.

Dated: this 9 day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Assistant United States Attorney,

Eugene Harpole,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant.

It is hereby agreed that the Appellant's above-amended Designation of the Contents of Record on Appeal from Order of October 30, 1943, may be substituted for the Appellant's Designation of Contents of Record on Appeal served and filed herein on May 5, 1944.

Dated: this 9th day of May, 1944.

Latham & Watkins

Dana Latham

Attorneys for Appellee.

[Endorsed]: Filed May 10, 1944. [272]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE  
ON APPEAL.

Good Cause Appearing Therefor, It Is Hereby Ordered that the time within which the United States of America may file the record under its Notice of Appeal filed herein on the 27th day of November, 1943, and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 25th day of February, 1944.

Dated this 5 day of January, 1944.

H. A. Hollzer

United States District Judge

[Endorsed]: Filed Jan. 5, 1944. [273]

[Title of District Court and Cause.]

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CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 273 inclusive contain full, true and correct copies of: Petitions of Consolidated Rock Products Co., Consumers Rock & Gravel Company, Inc., and Union Rock Company; Orders Approving Petitions; Order Continuing Debtor in Possession etc., dated July 2, 1935; Petition for Leave to File Claim for Deficiency in 1938 Income Taxes; Order Granting Leave to File Claim for Deficiency in 1938 Income Taxes; Claim of United States



for Taxes; Objections to Allowance of Claim for Deficiency in 1938 Income Taxes; Stipulation of Facts and Exhibits thereto; Statement of Testimony of Wilbur E. Thain; Memorandum of Conclusions; Findings of Fact and Conclusions of Law; Order dated October 30, 1943; Notice of Appeal; Statement of Points Upon Which Appellant Will Rely Upon Appeal From Order of October 30, 1943; Appellant's Amended Designation of Contents of Record on Appeal from Order of October 30, 1943; and Order Extending Time to Docket Cause on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of October 30, 1943.

Witness my hand and the seal of said District Court this 27 day of May, 1944.

(Seal)

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Deputy Clerk.

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[Endorsed]: No. 10784. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Consolidated Rock Products Co., a corporation, Union Rock Company, a corporation, and Consumers Rock & Gravel Company, Inc., a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 29, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the  
Ninth Circuit.

Undocketed.

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,

Debtor,

UNION ROCK COMPANY, a Delaware corporation,  
Subsidiary,

CONSUMERS ROCK & GRAVEL COMPANY, INC.,  
a Delaware corporation,

Subsidiary.

STIPULATION AND ORDER EXTENDING TIME  
TO DOCKET CAUSE ON APPEAL.

It Is Hereby Agreed by and between the parties hereto that, subject to the approval of the Court, the United States of America, appellant herein, may have to and including the 10th day of April, 1944, within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit under its Notice of Appeal filed herein on the 27th day of November, 1943. The reason and purpose of this Stipulation is to allow and provide additional time within which the United States District Court may enter its Findings and Opinion upon related matters which may become the subject of another appeal, which, if taken,

should, in the opinion of the counsel, properly be consolidated and heard with the pending appeal.

Dated: this 22nd day of February, 1944.

Charles H. Carr—E. H.  
CHARLES H. CARR,  
United States Attorney

E. H. Mitchell—E. H.  
E. H. MITCHELL,  
Asst. United States Attorney

Eugene Harpole  
EUGENE HARPOLE,  
Special Atty.,  
Bureau of Internal Revenue.  
Attorneys for Appellant.

LATHAM & WATKINS

By .....  
Attorneys for debtor.

It Is so Ordered this ..... day of 22nd, Feb., 1944.

Albert Lee Stephens  
Circuit Judge

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER EXTENDING TIME  
TO DOCKET CAUSE ON APPEAL.

It Is Hereby Agreed by and between the parties hereto that, subject to the approval of the Court, the United States of America, appellant herein, may have to and including the 1st day of June, 1944 within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit under its Notice of Appeal filed herein on the 27th day of November, 1943. The reason and purpose of this Stipulation is to allow and provide additional time within which the United States District Court may enter its Findings and Opinion upon related matters which may become the subject of another appeal, which, if taken, should, in the opinion of the counsel, properly be consolidated and heard with the pending appeal.

Dated, this 4th day of April, 1944.

Charles H. Carr—~~E. H.~~

CHARLES H. CARR,

United States Attorney

E. H. Mitchell

~~Eugene Harpole—E. H.~~

E. H. MITCHELL,

Assistant United States Attorney



Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

Attorneys for Appellant.

LATHAM & WATKINS

By .....

Attorneys for Debtor.

It is so ordered this 7th day of April, 1944.

Francis A. Garrecht

Circuit Judge

A true copy:

Attest: Apr 15, 1944.

(Seal)

Paul P. O'Brien

Paul P. O'Brien,

Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON ON  
APPEAL.

The appellant states that it intends to rely in its appeal from the Order of the District Court filed on October 30, 1943, upon the points mentioned in the statement of points relied upon by appellant, found at pages 269 and 270 of the Record on said Appeal.

Dated: this 22nd day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Asst. United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant

Receipt of copy acknowledged May 27, 1944. Latham & Watkins, Dana Latham.

[Endorsed]: Filed May 29, 1944. Paul P. O'Brien, Clerk.

No. 10785

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

vs.

CONSOLIDATED ROCK PRODUCTS CO., a corporation,  
UNION ROCK COMPANY, a corporation,  
and CONSUMERS ROCK & GRAVEL COMPANY,  
INC., a corporation,

Appellees.

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## TRANSCRIPT OF RECORD

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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At a stated term, to-wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 23rd day of December in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 25,816-H Bkey

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO.,  
a corporation,

Debtor.

This matter coming on for further hearing on Reports of Examiner Guy R. Varnum, etc.; Paul Fussell, Esq., of O'Melveny & Myers, appearing as counsel for Union Rock Co. Bondholders' Protective Committee; J. C. Macfarland, Esq., of Gibson, Dunn & Crutcher, appearing as counsel for Consumers Rock & Gravel Co. Bondholders' Protective Committee; Chas. F. Johnson and Leon S. Alschuler, Esqs., appearing for the Securities & Exchange Commission; Joseph L. Lewinson, Esq., appearing as counsel for Preferred Stockholders' Committee; E. S. Williams, Esq., appearing in propria persona; Geo. H. Emerson, Esq., appearing for a bondholder; Ransome Chase, Esq., appearing for certain stockholders; Edward D. Lyman and George W. Prince, Esqs., of Overton, Lyman & Plumb, appearing for Guy R. Varnum, Examiner; Ross Reynolds and A. H. Bargon, Court Reporters, being present and reporting the proceedings.



The Court renders oral opinion on the "Interest on Interest" question and rules that bondholders are entitled to interest on interest, but that holders of Union Rock Co. bonds maturing in 1933 are entitled to only 6% interest on bonds. Exception noted to aggrieved parties.

\* \* \* \* \* [2\*]

## CONSOLIDATED ROCK PRODUCTS CO.

Excerpts From Reporters' Transcript of  
Testimony and Proceedings

Volume 49 Pages 4802 to 4824

Opinion of the Court In Re:

Interest on Unpaid Bond Interest  
December 23, 1942 [3]

The Court: The opinion about to be rendered perhaps might, with more deliberation, be phrased with some changes in wording but I feel that the essence of what is about to be stated and the conclusions reached will be sufficiently clear. In substance, they express the views that I feel must be reached in the decision.

There are two questions that have been presented here. The one that we shall discuss first is are the holders of the Union Rock Company bonds maturing in 1933 entitled to 7 per cent or only 6 per cent interest on said bonds.

Said claim to 7 per cent interest is based upon certain evidence consisting of various entries in the minutes of a

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\*Page number appearing at foot of Certified Transcript.

special meeting held by the board of directors of the debtor on August 18, 1933. Said minutes include a statement by the president of the debtor to the effect that, upon talking to the underwriters of Union Rock Company bonds, he had been informed by them that they were agreeable to postponing payment of the principal of Union bonds maturing September 1, 1933 upon the condition that a letter be sent to the holders of such bonds advising them that the company is unable to pay the principal at said time but that, as soon as working capital of the company is brought to the point which seems sufficient, any excess will be distributed pro rata to the holders of such bonds. In addition, said minutes, next, show that the president of the company stated that the underwriter asked that the letter to the holders of the 1933 [4] maturity Union bonds state nothing would be paid to the holders of the bonds of Consumers Rock & Gravel Company until said Union bonds due September 1, 1933 had been paid. Whereupon discussion had among the directors disclosed it was the consensus of their opinions that the company should not commit itself relative to the payment of interest or principal on the Consumers Rock & Gravel Company bonds.

Said minutes also show that, immediately following the latter discussion, the following resolution was adopted, "Resolved, that payment of \$57,000 par value of Union Rock Company bonds be postponed until such time as this company has sufficient funds available over and above minimum requirements of working capital, and that a letter be sent to all holders of 1933 maturities of Union Rock bonds advising them of such postponement."

Likewise, the evidence shows that a copy of a certain letter had been placed in the minute book of the debtor

immediately following the minutes of said directors' meeting of August 18, 1933. This letter, admitted in evidence as Bondholders' Exhibit No. 9, bears date August 28, 1933. It is on the letterhead of the Union Rock Company and purports to have been signed by the president of the latter company and to have been addressed "To the Holders of Union Rock Company First Mortgage Serial and Sinking Fund Gold Bonds maturing September 1, 1933." In this letter, after discussing the financial difficulties confronting the debtor and [5] the Union Rock Company, the signer concludes as follows: "We would, therefore, ask that you simply hold your bonds at the present time with the understanding that, as rapidly as moneys are paid into this corporation for such purposes by Consolidated, they will be distributed pro rata to you. In addition to that, it is understood that interest will be paid upon the principal of your bonds remaining unpaid at the rate of 7 per cent per annum and starting September 1, 1933. Under this plan of procedure, there will be no expense whatsoever for trustees or depositaries or committees. We regret that conditions compel us to ask this forbearance on your part."

I skip the next two sentences because they have no relevancy here and then read the concluding sentence of the letter, "We feel that, if you will co-operate as suggested in this letter, your bonds will be paid off and that these organizations will be able to continue to function as one of the major industries in southern California." [6]

As a part of the record bearing upon this question, counsel have stipulated as set forth in the reporter's transcript, beginning at page 4204, line 12, and continuing to page 4205, line 1, then skipping to page 4206, line 15,

and continuing to page 4208, line 6, resuming further on page 4208, lines 15 to 22, then further, on page 4209, lines 16 to 19, and finally, page 4216, line 19, to page 4217, line 9.

I would suggest that for the purpose of accuracy, the reporter incorporate those excerpts, but I feel it unnecessary to repeat them at this particular moment.

(Said excerpts are as follows:)

"And I would ask counsel also to join in stipulating that the letter referred to was, in fact, sent to the holders of Union Rock Company first mortgage serial and sinking fund gold bonds of the maturity which fell due September 1, 1933. I would like counsel—

Mr. Lewinson: Just a minute. You mean by that, that you are asking for a stipulation that the letter which you have presented here, and which I presume you will ask to have marked as an exhibit—

Mr. Fussell: Correct.

Mr. Lewinson: —was placed in the mails, directed to the holders of Union Rock Company bonds of the maturity you speak of?

Mr. Fussell: At their addresses as best known to the [7] company.

Mr. Lewinson: We will so stipulate."

"I would ask counsel also to join in stipulating that no action was taken by reason of the default in the non-payment of the 1933 serial maturity of Union Rock Company bonds until the organization of the Union Rock Company bondholders' committee on about May 23, 1935.

Mr. Macfarland: I will so stipulate.



Mr. Lewinson: Let's see; do you mean no action was taken by way of filing suit or instituting foreclosure proceedings or to demand payment of bonds that matured at that time or to demand payment or to enforce the payment of interest that had then accrued? Is that what you mean, Mr. Fussell?

Mr. Fussell: Or to enforce any rights by reason of the default in payment of the 1933 maturity.

Mr. Lewinson: I am willing to enter into a stipulation to that end, but I would like to have it a little more carefully phrased.

Mr. Fussell: I think I might phrase it this way: That no action was taken by reason of the default in the payment of the 1933 serial maturity of Union Rock Company bonds, either to enforce payment of the bonds or to enforce any of the provisions of the indenture by reason of such default; and that no request was made upon the indenture trustee that he take any action by reason of such default. [8]

Mr. Lewinson: By that you mean that no request was made by any of the holders of the bonds on the indenture trustee, is that right?

Mr. Fussell: That is correct.

Mr. Lewinson: And then by speaking of "action" you mean that no action at law or suit in equity was filed?

Mr. Fussell: I include that but I do not limit it to that.

Mr. Lewinson: What else is included?

Mr. Fussell: I mean that no step was taken by the trustee, for example, to demand possession of the trust estate.

Mr. Lewinson: All right.

Mr. Fussell: That no action was taken by the trustee to declare the principal of the bonds due; that no suit was filed either at law or in equity; and that no other step was taken by the trustee to enforce any of the provisions of the indenture.

Mr. Lewinson: What do you mean by "no other step"? I am with you up to that point."

"Mr. Macfarland: I think we might include that no demand was served by any bondholder or group of bondholders upon the trustee to take any of the steps provided in the trust indenture."

Mr. Lewinson: No demand was served by any of the bondholders or groups of bondholders involved upon the [9] company.

Mr. Macfarland: Yes; that would be all right."

"Mr. Fussell: I will be glad to accept the stipulation as far as it is tendered at this time, and if upon reading the transcript it seems advisable to go beyond, I will take Mr. Lewinson's suggestion."

"There is one other point on which I would ask for a stipulation and that is that the Consolidated Rock Products Company has accrued interest on the Union Rock Company bonds, which matured in 1933, at the rate of 7% per annum, rather than at the rate of 6% per annum, according to its own records.

Mr. Lewinson: I am not advised about that but I am willing to take your statement. Do you mean by that that on the books of the Consolidated Rock Products Company interest has been charged at 7% as to this item instead of 6%?

Mr. Fussell: Yes; that is correct.

Mr. Lewinson: On your statement, I will stipulate to that.

Mr. Macfarland. I will so stipulate.

Mr. Roeschlaub: So stipulated.

The Court: I take it, then, all of counsel join in the stipulation just offered."

To complete the record, it should be stated that the aforementioned bonds and the trust indenture executed by the Union Rock Company to secure the same specified that said [10] bonds should bear interest at the rate of 6% per annum. Upon this evidence counsel for the Union Rock Company bondholders' committee contend that, since the holders of 1933 maturity bonds did forbear to demand or take any step to enforce payment thereof until the organization of Union Rock Company bondholders' committee about May 23, 1935, the holders of these last mentioned bonds have become entitled to 7%, instead of 6%, interest from and after September 1, 1933. Said counsel argue that by reason of such forbearance the promise contained in said letter of August 28, 1933 became a binding obligation on the part of Union Rock Company, sanctioned by the debtor which owned and controlled all of the stock of the former, to pay such increased rate of interest on said bonds. [11]

Thus the written agreement executed by the Union Rock Company to pay 6 per cent interest on said bonds according to the terms thereof and the provisions of the trust indenture which it executed to secure payment of same would be modified to the extent indicated.

It is conceded that no resolution was approved by the board of directors of Union Rock Company either authorizing the sending of the aforementioned letter, Bond-

holders' Exhibit No. 9, or otherwise agreeing to pay any increased rate of interest on said bonds.

It is equally clear that the only action taken by the board of directors of the debtor relative to said bonds, as shown by the minutes of the meeting held by said board of directors on August 18, 1933, was to authorize sending a letter advising the holders of said bonds that the company was then unable to pay the principal thereof, but that as soon as sufficient working capital should be accumulated, any excess would be distributed pro rata to the holders of said bonds. It will be observed that no mention of any kind is made in said minutes to paying interest in any amount, much less an increased rate of interest, on said bonds.

Indeed, it should be noted that, whereas said meeting was held by the directors of the debtor on August 18, 1933, the letter containing the promise to pay the increased rate of interest bears date 10 days later, to-wit, August 28th, 1933. This circumstance rather persuasively points to the [12] conclusion that no such letter was in existence at the time of the aforementioned directors' meeting.

As stated in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, at page 78:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

Admittedly the question here under consideration is governed by the law of California.

It is conceded that the only basis for the contention that the President of Union Rock Company was authorized



to send the letter of August 28, 1933, is to be found in the previously quoted excerpts from the minutes of the meeting of directors of debtor held on August 18, 1933.

"It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the laws and by the board of directors and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, Section 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corpora- [13] tion nor to control its property, funds or management.' "

The foregoing quotation was taken from *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494. This appears to be a leading case on the point just discussed, and that case has been cited and quoted at length with approval in many other cases, including *International Magazine Co. v. National Radio Co.*, 67 Cal. App. 498, 227 Pac. 918; *Padgham v. Inyo Marble Co.*, 2 Pac. (2d) 531; *Zellerbach Paper Co. v. Virden Packing Co.*, decided by the District Court of Appeals in 1935, hearing denied by the Supreme Court, and reported in 10 Cal. App. (2d) 635.

Assuming for the purpose of this discussion that the president of Union Rock Company had authority to send the letter of August 28, 1933, and particularly to make the promise incorporated therein to pay the increased rate

of interest, there is a further ground upon which such claim for the higher interest rate must be rejected.

While it is true that the holders of the 1933 maturity bonds did forbear to take action to enforce payment of said bonds until Union Bondholders' Committee had been formed in 1935, the fact remains said bondholders did not bind themselves to forbear doing so.

Although conceding this to be the fact, counsel for the Union Bondholders' Committee nevertheless contend that the California decisions on this point are in conflict. Accordingly they argue that the general rule upon this subject [14] governs the present situation, and that such general law is to the effect—as declared in the Restatement of Law (published by American Law Institute) on Contracts—that, “Consideration for a promise is \* \* \* a forbearance, \* \* \*.” This is taken from Section 75 of the Restatement of the Law of Contracts.

And also, reference is made to comment (d) to the same section, which reads, so far as pertinent:

“In unilateral contracts the consideration is something other than a promise. It may be a certified act of forbearance, \* \* \*.”

Our study of the cases of *Estate of Thomson*, 165 Cal. 290; *Tiffany v. Spreckles*, 202 Cal. 778; *Wine Packing Corp. v. Voss*, 37 Cal. App. (2d) 528; and *Queen v. Queen*, 44 Cal. App. (2d) 475, persuades us that the rule in this state supports the position taken by counsel for respective stockholders' committees and that, accordingly, there was no binding agreement to forbear and no consideration to render binding any promise such as the president of Union Rock Company made in the letter aforementioned.

This brings us to the remaining question requiring decision at this time:

Are the bondholders entitled to interest on past due interest? [15]

Here, again, it should be stated that if there be a California statute covering this subject, or if the courts of this state have ruled thereon, then it becomes the duty of this court to follow the law as thus defined.

In clarification of the doctrine previously announced in *Erie Railroad Co. v. Tompkins*, the Supreme Court declared in *Fidelity Trust Co. v. Field*, 311 U. S. 169, at pp. 177-178:

"It is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the state. See *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West v. American Telephone & Telegraph Co.* post, p. 223." [16]

Counsel for the preferred stockholders' committee and counsel for the common stockholders' committee assert that the law governing this question is to be found in the California Usury Act (*Deering's General Laws*, Section 3757), particularly Section 2 thereof. So far as pertinent here, that section in substance declares that in the computation of interest upon any bond or other agreement, interest shall not be compounded, nor shall the

interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged.

In this connection counsel for the respective stockholders' committees point out that in the case of *In re Washer*, 200 Cal. 598, 602, the Supreme Court of California declared that the State Usury Act had been virtually copied from a similar statute of Wisconsin. They further argue that prior to the enactment of this law in California the highest court of Wisconsin had construed its own statute and had held in the case of *First Savings & Trust Co. v. Cazenovia & S. C. R. Co.*, 150 N. W. 405, that a provision practically identical with Section 2 of the California Usury Act was applicable to and governed interest rates on corporate bonds. Accordingly counsel contend that since it is settled law that when a statute is adopted from another State and such law has previously been construed by the courts of such state, the statute is deemed as a general rule [17] to have been adopted with the construction so given to it—citing *Estate of Potter*, 188 Cal. 55, particularly page 68,—that Section 2 of the California Usury Act must be given a construction similar to that given to the corresponding provision in the Wisconsin statute.

It is not disputed that in determining the rights of bondholders the provisions of the bonds must be read in conjunction with the terms and conditions of the respective trust indentures securing the same. Accordingly, if the California Usury Act is applicable to bonds involved here, we must look to the language of those trust indentures for any express agreement to pay interest on interest, for it is admitted that the bonds themselves contain no such promise as is required by Section 2 of



said Act. Counsel for the respective stockholders' committees further contend that no such agreement can be found in said trust indentures. Hence they conclude that the bondholders should not be awarded interest on interest.

On the other hand, opposing counsel insist that the position thus taken by those representing the two stockholders' committees is without merit for the several reasons which we shall now discuss.

The first ground advanced is that by the provisions of Sections 3302 and 3287 of the California Civil Code the allowance of interest on past due interest is made mandatory. In addition, it is pointed out that by the great weight of [18] authority interest is recoverable upon coupons after their maturity notwithstanding the absence of a provision therefor in the bonds, coupons or mortgage or deed of trust given as security, citing Jones on Bonds & Bond Securities (Fourth Edition) Section 735, and McClelland & Fisher on Law of Corporate Mortgage Bond Issues, pages 502 and 503.

Secondly, opposing counsel urge that, if Section 2 of the California Usury Act pertains to corporate bonds, then the same is invalid as being in violation of Section 24 of Article IV of the California constitution. In support of this contention, it is pointed out that said Section 24 provides that every act shall embrace but one subject, which subject shall be expressed in its title, but, if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed.

It is further pointed out that the California Supreme Court, in the case of Wallace v. Zinman, 200 Cal. 585,

particularly at page 590, decided that the subject covered by the title of the aforementioned Act is exclusively "usury". In this same connection, opposing counsel cite the cases of *In re Washer*, 200 Cal. 598, particularly at pages 605, 606 and 607, and *Beneficial Loan Society v. Haight*, 215 Cal. 506, particularly at page 509, as holding that the issuance and sale of corporate bonds do not constitute a loan and that the provisions of the California Usury Act are not applicable to [19] or do not affect such securities.

Accordingly, it is argued that, since the provisions of Section 2 of the California Usury Act are not properly the subject of usury, or properly the subject of a usury statute, it follows that the title of said act does not embrace the subject of Section 2 thereof. In other words, the latter section may be said to embrace a subject not expressed in the title of said Act. Hence, it is insisted that said Section 2 must be declared invalid.

Thirdly, opposing counsel contend that, assuming Section 2 of the State Usury Act is valid and governs the subject of interest on interest accrued upon corporate bonds involved here, each of the trust indentures securing said bonds contains provisions which meet the requirements of Section 2.

With respect to the contention to the effect that Section 2 of the California Usury Act violates the provisions of Section 24 of Article IV of the State constitution, we deem it sufficient to point out that the rulings announced in the cases presently to be cited foreclose a reexamination of that question. By at least four decisions, the courts of this State have held that Section 2 is valid. The cases referred to are *In re Washer*, 200

Cal. 598, *Haines v. Commercial Mortgage Company*, 200 Cal. 609, *Beneficial Loan Society v. Haight*, 215 Cal. 500, and *Schneider v. Turner*, 10 Cal. App. (2d) 771. [20]

We now turn our attention to the remaining points raised by counsel for the respective bondholders' committees. We feel it cannot be successfully controverted that the issuance and sale of bonds of the type involved here are governed and controlled by the California Corporate Securities Act and that by said Act the Corporation Commissioner is vested with the authority to determine upon what terms and conditions such securities may be issued and sold. In other words, the provisions contained in such bonds and in the trust indentures securing the same must receive approval of said Commissioner before the securities may be issued or sold. Likewise, in our opinion, the highest court of California has definitely ruled that by the adoption of the Usury Act the people of this State never intended to repeal or modify the California Corporate Securities Act or to hamper the operation of that law or to subject the issuance or sale of corporate securities to operation of any of the provisions of the Usury statute. [21] In the cases of *In re Washer*, 200 Cal. 598, particularly at pages 605, 606 and 607, and *Beneficial Loan Society v. Haight*, 215 Cal. 506, particularly at page 509, that court, in effect, held that the Usury Act neither established the maximum rate of interest for corporate bonds nor otherwise controlled or regulated the rate of interest payable upon such securities. Upon this ground alone, we would be warranted in concluding that Section 2 of the California Usury Act is not applicable to bonds involved here. However, assuming that Section 2 is applicable here, we are convinced



that both the Union and the Consumers trust indentures contain express agreements which meet the requirements of that statute. These provisions, so far as relevant to the question now being considered, are practically identical in both trust indentures, with but one exception to be hereafter noted.

Article VII, Section 2, of the Union Bond trust indenture deals with the rights of the parties in the event of default and provides for entry by the trustee and distribution of the net proceeds of operations as follows. The pertinent parts of this section, I think are quite familiar to all of counsel here. Nothing would be gained by quoting them, as they have been read into the record and may be found in the reporters' transcript. I find them also copied in the memorandum filed by Mr. Fussell, particularly beginning at page 5, line 20, and continuing to page 6, line 9. Again there is a pertinent excerpt from Article VII, Section 14, which provides that [22] the proceeds of any sale by the trustee, after payment of charges and expenses which are entitled to priority, shall be distributed as follows, and the pertinent language is copied in Mr. Fussell's memorandum beginning on page 6, lines 15 to 28.

Then, there is Section 15 of the same Article, which provides that, if the proceeds of the sale by the trustee are insufficient to pay the amount due upon the bonds and coupons, the trustee shall be entitled to receive and to enforce payment of any deficiency "and shall be entitled to recover judgment for any portion of the debt secured hereby remaining unpaid, with interest."

Section 17 of the same Article defines the conditions under which a default shall be deemed to have been cured



so as to restore the parties to the positions which they occupied prior to default. One of the requirements thus imposed is that the obligor shall have paid "the principal of all bonds which shall have become due by their terms and all arrears of interest with interest on overdue principal at the rates borne by the respective bonds and on the overdue installments of interest at the rate of 7 per cent per annum."

In addition to the foregoing provisions, which, as previously stated, are practically identical in both trust indentures, it should be noted that Article VIII, Section 15, of the Consumers bond trust indenture bears upon this subject. The pertinent language has, likewise, been quoted in the [23] reporters' transcript and is, again, found in the memorandum filed by Mr. McLaughlin at the top of page 5.

During the argument, our attention was also called by counsel for the common stockholders' committee to certain other provisions of the trust indentures as tending to throw light on how the provisions last referred to should be construed. Counsel for the preferred stockholders urges, in effect, that the right of the bondholders to interest on interest may only be enforced by pursuing those particular remedies expressly stated in the trust indentures; that, since under the provisions of Section 77B of the Bankruptcy Act the rights of all creditors are frozen as of the date of the filing of the debtor's petition, citing *Eldredge Brewing Company v. City of Portsmouth*, 118 Fed. (2d) 410, particularly at page 414, and since the bondholders failed to avail themselves of any of said remedies, they thereby have lost the right to interest on past due interest. This argument, in effect, means that,

once proceedings have been instituted under Section 77B of the Bankruptcy Act or under the later Chapter X, the bondholders, along with all other creditors, lose all their contractual remedies and are restricted to only such remedies as the statute specifies, and that we are here concerned with only a remedy granted by contract, a remedy which the statute does not preserve.

We are unable to follow counsel to the conclusion they have reached. Admittedly, the bondholders' right to payment [24] of principal of their bonds is a property right. Equally true is it that the bondholders' right to payment of interest on principal of their bonds is a property right. Once a default has occurred in the payment of interest, we are unable to perceive any distinction between the property right of the bondholders to either interest on principal or their right to interest on such past due interest. To our mind, each is a property right.

When these proceedings were filed under Section 77B, the bondholders had a valid lien on the debtor's assets whereby not only the principal and interest on principal of said bonds were secured but also interest on any past due interest was secured.

As pointed out by the Supreme Court in *Louisville Bank v. Radford*, 295 U. S. 555, no bankruptcy statute, up until the enactment of the first Frazier-Lemke Act, had undertaken to modify any substantive right of the holder of a valid mortgage, nor had the Supreme Court ever held that under bankruptcy legislation valid liens could be impaired or that property subject to a lien could be sold to the prejudice of the lienor. In the latter case the court held that, because the first Frazier-Lemke Act took from the mortgagee rights in specific property held as

security without just compensation, such legislation was in conflict with the Fifth Amendment and, hence, was declared void.

So in the present proceeding we conclude that to deny [25] the bondholders interest on past due interest would be to deprive them of their property without any just compensation.

It may be, as I said at the outset, that one might readily challenge some of the phrasing here but I am definitely of the opinion, on the one hand, that the holders of the 1933 maturity Union bonds are limited to the interest rate specified in the bonds and that, on the other hand, the bondholders are entitled to interest on past due interest.

Mr. Lewinson: Your Honor, I don't know that it is necessary to take an exception under the present practice but, on behalf of the preferred stockholders' committee, and out of an excess of caution, I would like to save an exception as to the part of the ruling that holds that the bondholders are entitled to interest on interest.

The Court: Yes.

Mr. Ransom W. Chase: If the Court please, may the record show a like exception on behalf of the stockholders represented by us, that is, the common stockholders represented by us?

The Court: Yes. \* \* \* \* \*

[Endorsed]: Filed Jun. 5, 1943. [26]

[Title of District Court and Cause.]

STATEMENT OF TESTIMONY OF  
WILBUR E. THAIN

Wilbur E. Thain, a witness called on behalf of the debtor, being first duly sworn, testified on March 27, 1944, as follows:

(Direct Examination)

My name is Wilbur E. Thain. My home address is 10533 Butterfield Road, Los Angeles. My occupation is that of auditor for the Consolidated Rock Products Company and its subsidiary companies. I have examined the findings of fact, conclusions of law and the Court's Order in connection with the pending 1938 income tax case of Consolidated Rock Products Company. I am familiar with the findings contained in these documents. I have consulted with the government agents with respect to a determination of the amounts provided for in those documents. I have made a complete computation of the amounts of depreciation, depletion and amortization on the properties of Consolidated's subsidiaries to which Consolidated is entitled as a deduction for the year 1938 under [27] the documents just referred to. Those amounts have been agreed to with the government representatives. The names of the government's representatives are Mr. Maddocks and Mr. Gates. Mr. Maddocks is present in court this morning.

The amount of depletion as agreed upon for the year 1938, relating to the properties of the subsidiary com-



panies only is \$7,747.32; the amount of amortization of leaseholds is \$6,538.46, and the amount of depreciation is \$64,253.52. No part of those amounts has been allowed by the United States as a deduction in determining the debtor's income tax liability for the year 1938.

I have determined the amount of the excessive interest deducted by Consolidated for the year 1938 on account of the claim for interest at 7 per cent instead of six per cent to be the amount of \$550.00, being 1 per cent of the 1933 maturity Union Rock bonds.

I have made a determination as to the amount of interest upon interest set up on Consolidated's books on account of the Court's Order of December 23, 1942. The amount on outstanding Union Rock bonds for the year 1938, is \$34,784.75, and the amount on outstanding Consumers Rock and Gravel Company, Inc. bonds is \$17,396.10. A total of \$52,180.85. Then, deducting the over-accrual on regular interest of \$550 it gives us a net amount of \$51,630.85. No part of that has been claimed by Consolidated on its income tax returns for the year 1938. No part of it has been allowed by the United States Treasury Department as a deduction in determining Consolidated's tax liability for that year to date.

Those amounts have all been set up as liabilities on Consolidated's books and as a charge to expense accounts, and so appear on the books today in accordance with the Court's Order. Mr. Gates, of the Internal Revenue De-

partment, has checked those figures and they agree as to the amounts, as to the computations. [28]

### Cross Examination

Mr. Maddocks, Mr. Gates, Mr. Hanson and John B. Richards, of whom I speak, are revenue agents.

Dated: this 3rd day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Assistant United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant.

[Endorsed]: Filed May 4, 1944. [29]

[DEBTOR'S EXHIBIT 1]

No. 25816-H

In the Matter of  
CONSOLIDATED ROCK PRODUCTS CO.,  
a Corporation, Debtor.

Re Claim of the United States for Additional Income  
Taxes for the Calendar Year 1938.

RECOMPUTATION OF FEDERAL INCOME TAX  
LIABILITY

Net Income as determined by the United States	\$152,266.30
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Reductions:

Additional depreciation on Consolidated's own properties (Paragraph X, Stipulation)	\$ 3,302.21
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Flood loss not deducted (Paragraph XI, Stipulation)	15,754.92
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Amounts representing depreciation upon properties owned by subsidiaries (Court's Findings and Conclusions, and Thain testimony of Mar. 27, 1944)	64,253.52
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Amounts representing depletion upon properties owned by subsidiaries (Court's Findings and Conclusions, and Thain testimony of Mar. 27, 1944)	7,747.32
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Amounts representing amortization of leaseholds of subsidiaries (Court's Findings and Conclusions, and Thain testimony of Mar. 27, 1944)	6,538.46
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Interest upon defaulted bond interest	52,183.85
	<hr/>
	\$149,780.28

## Additions to Income:

Excessive interest on Union Rock bonds, deducted and allowed	550.00
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Net Reduction in Income	\$149,230.28
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Net Revised Taxable Income (Fwd.)	\$ 3,036.02
	[30]

Net Revised Taxable Income (Brought Forward)	\$ 3,036.02
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Taxes Due—12½% of \$3,036.02	\$ 379.50
Tax Paid	None

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Tax Due	\$ 379.50
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Interest on \$379.50 at 6% from Mar. 15, 1939 (due date) to Nov. 28, 1941 (date of assessment of defici- ency; See Paragraph II of Stipula- tion)	61.67
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Total Tax and Interest	\$ 441.17
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There is due the United States \$441.17 together with interest thereon at 6% per annum from November 29, 1941 to date of payment.

Case No. 25,816-H-Bkcy. In Re Consolidated Rock Products Co. Debtor's Exhibit Date Apr. 24, 1944, No. 1 in Evidence. Clerk, U S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [31]



[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

Supplemental Findings of Fact

This cause came on regularly for trial on March 27, 1944 before the Honorable Harry A. Hollzer, sitting without a jury, all in accordance with the Order of said Court dated October 30, 1943. The debtor appearing by its counsel, Latham & Watkins by Dana Latham; the United States, claimant herein, appearing by Charles H. Carr, United States Attorney for the Southern District of California; E. H. Mitchell, Assistant United States Attorney for said District, and [32] Eugene Harpole, Special Attorney for the Bureau of Internal Revenue; and, oral evidence having been received and considered by the Court, the Court being fully advised in the premises now makes the following supplemental findings of fact, to-wit:

I.

In its Federal income tax return for the calendar year 1938 neither the debtor, Consolidated Rock Products Co., nor any of its subsidiary companies deducted or claimed in any way in determining the taxable net income of said debtor for said calendar year any amount for interest accruing on account of the default by the debtor and/or its subsidiaries in the payment of interest which had accrued in prior years on bonds issued by certain of the subsidiaries of said debtor.

## II.

This Court in this proceeding under date of December 23, 1942 by oral opinion appearing in Volume 49, pages 4802 to 4824 of the reporter's transcript of testimony and proceedings, held that this debtor was liable for interest upon defaulted interest and said decision has become final.

## III.

The amount of said interest upon defaulted interest accruing during and for the calendar year 1938 with respect to which the debtor is entitled to a deduction in determining its net income tax liability for said year is \$52,183.85.

## IV.

On said December 23, 1942, this Court by oral opinion reported as aforesaid in paragraph II of these Supplemental Findings held that the holders of the bonds issued by debtor's subsidiary, Union Rock Company, maturing in 1933 were entitled to interest thereon at 6% instead of 7%, and said decision has become final.

## V.

The debtor, Consolidated Rock Products Co., in determining [33] its taxable net income for the calendar year 1938 deducted said interest accruing on account of said Union Rock Company bonds maturing in 1933, at the rate of 7% instead of said 6% and accordingly, over-stated its allowable deductions for said year in the amount of \$550.00.

## VI.

The depreciation sustained by debtor's various subsidiary companies for the calendar year 1938 and which

debtor is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$64,253.52.

## VII.

The depletion sustained by debtor's various subsidiary companies for the calendar year 1938 and which debtor is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$7,747.32.

## VIII.

The amortization of leaseholds of debtor's various subsidiary companies for the calendar year 1938 and which debtor is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$6,538.46.

## Supplemental Conclusions of Law

### I.

The income tax liability of the debtor herein for the calendar year 1938 shall be computed in accordance with paragraphs VII, VIII, IX, X and XI of the Stipulation of Facts entered into by the parties hereto.

### II.

In addition to the adjustments referred to in paragraph I above of these Supplemental Conclusions of Law, the debtor herein in determining its net taxable income for the calendar year 1938 is entitled to deduct from its net

income as adjusted as above set forth the following amounts: [34]

(a) Amounts representing depreciation upon properties owned by various subsidiary companies	\$64,253.52
(b) Amounts representing depletion upon properties owned by various subsidiary companies	7,747.32
(c) Amounts representing amortization of leaseholds upon properties owned by various subsidiary companies	6,538.46
(d) Interest accrued upon defaulted bond interest	52,183.85

### III.

The net income of debtor herein for the calendar year 1938 determined as set forth in paragraphs I and II of these Supplemental Conclusions of Law shall be increased by the amount of \$550.00 representing excessive interest on bonds issued by Union Rock Company and maturing in 1933 and heretofore allowed as a deduction to debtor in determining its said taxable net income.

### IV.

The net taxable income of the debtor herein, Consolidated Rock Products Co., for the calendar year 1938, is \$3,036.02.



V.

There is due to the United States of America, claimant herein, and unpaid from debtor herein, Consolidated Rock Products Co., for income taxes and interest for the calendar year 1938, the sum of \$441.17, together with interest thereon at the rate of 6% per annum from November 29, 1941 until paid and judgment therefor shall be entered accordingly.

H. A. Hollzer

Judge

Dated: April 24, 1944

Approved as to Form:

Eugene Harpole

Counsel for Claimant

Received copy of the within Supplemental Findings of Fact & Conclusions of Law this 30th day of April, 1944.  
Eugene Harpole by B. H., Attorney for Claimant.

[Endorsed]: Filed Apr. 24, 1944. [35]

In the District Court of the United States  
Southern District of California  
Central Division

No. 25816-H

In Proceedings for the Reorganization of a Corporation

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO.,  
a corporation,

Debtor ;

CONSUMERS ROCK & GRAVEL COMPANY, INC.,  
a corporation,

Subsidiary ;

UNION ROCK COMPANY, a corporation,

Subsidiary.

JUDGMENT ON CLAIM OF UNITED STATES OF  
AMERICA AGAINST DEBTOR FOR INCOME  
TAXES FOR THE CALENDAR YEAR 1938.

The United States of America having, pursuant to order of this Court dated March 9, 1942 granting leave so to do, filed, on March 26, 1942, its claim against debtor herein for Federal income taxes for the calendar year 1938 in the amount of \$25,112.72 plus interest thereon to November 28, 1941 in the amount of \$4,071.70; objections to the allowance of said claim either in whole or in part having been duly filed by the debtor; the matter having come on regularly for trial on November 6, 1942 and April 27, 1943 before this Court; evidence both oral and written having been received by the [36] Court; it having been stipulated by the parties that the hearings

first had in connection with said claim and the preliminary decision of the Court should cover only questions of law raised by the claim of the United States; it having further been stipulated that if the Court should determine that the debtor is entitled to deduct, in determining its net taxable income for the calendar year 1938, amounts equal to the depreciation and depletion sustained with respect to the properties of the so-called owning companies together with amortization of leaseholds of said companies, the amount of said deduction should be agreed upon between the parties or if the parties could not agree thereto, should be determined by this Court in a subsequent proceeding. This Court, on October 12, 1943, having made and entered its Findings of Fact and Conclusions of Law, holding among other things that the debtor is so entitled to deduct, in determining its net taxable income for the calendar year 1938, amounts equal to the depreciation and depletion sustained with respect to the properties of the so-called owning companies together with amortization of leaseholds of said companies; the Court having, on October 30th, 1943, entered its order based upon said Findings of Fact and Conclusions of Law and further directing the parties either to reach an agreement as to the computation of the tax liability or to submit the matter for further hearing to this Court; further hearings in the matter having been held on March 27, 1944 and April 24, 1944; evidence both oral and written having been submitted with respect to the amounts of depreciation and depletion sustained with respect to the properties or the so-called owning companies together with amortization of leaseholds of said companies; a computation of the Federal income tax liability of debtor for the year 1938 having been submitted to the Court; sup-

plemental Findings of Fact and Conclusions of Law having been made and entered in this proceeding on April 24, 1944; and good cause appearing therefor.

It Is Hereby Ordered, Adjudged and Decreed: [37]

(1) The debtor is entitled, in determining its net taxable income for the calendar year 1938, to deduct as expenses of operation the depreciation and depletion of properties and the amortization of leaseholds sustained by the seven so-called owning companies, to-wit: Consumers Rock & Gravel Company, Inc. (Delaware), Union Rock Company (Delaware); Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company (Delaware), Atlas Mixed Mortar Company, and Union Rock Land Company, the properties of which were used and operated during said calendar year 1938 by the debtor herein in connection with its business. In determining the amount of said depreciation and depletion of properties and amortization of leaseholds, no account shall be given to the so-called "Modification of Operating Agreement" dated February 16, 1933. Instead said depreciation and depletion of properties and amortization of leaseholds shall be determined in accordance with the provisions of the Federal Internal Revenue Code and the applicable Regulations issued thereunder.

(2) The debtor is entitled to a deduction, in determining its net taxable income for the calendar year 1938, of the amount of interest which accrued during said year 1938 on account of the default by the debtor and/or its subsidiaries in the payment of interest which had accrued in prior years on bonds issued by certain of the subsidiaries of the debtor.



(3) The net taxable income of the debtor herein for the calendar year 1938 is \$3,036.02.

(4) There is due to the United States of America, claimant herein, and unpaid from debtor herein for income taxes and interest for the calendar year 1938 the sum of \$441.17, together with interest thereon at the rate of six per cent per annum from November 29, 1941 until paid. Judgment is hereby given in favor of claimant, United States of America, in said amount.

(5) The proper officers of debtor, Consolidated Rock [38] Products Co., are hereby authorized, empowered and directed to pay said judgment to claimant and to take whatever steps are necessary to carry out the terms hereof.

Dated: April 24, 1944.

H. A. Hollzer

H. A. Hollzer

Judge of the District Court

Approved as to Form:

Eugene Harpole

Counsel for Claimant

Judgment entered Apr. 24, 1944. Docketed Apr. 24, 1944. C. O. Book 25, Page 92. Edmund L. Smith, Clerk, By L. Wayne Thomas, Deputy.

Received copy of the within Judgment this 21 day of April, 1944. Eugene Harpole, Attorney for Claimant.

[Endorsed]: Filed Apr. 24, 1944. [39]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled proceeding on the 24th day of April, 1944, reducing the claim of the United States against the debtor for Federal income taxes for the calendar year 1938, from the sum of \$25,112.72, plus interest, to the sum of \$441.17, with interest, and allowing said claim in the latter amount only.

Dated: this 24th day of April, 1944.

CHARLES H. CARR,  
United States Attorney

E. H. MITCHELL,  
Asst. United States Attorney

EUGENE HARPOLE,  
Special Attorney  
Bureau of Internal Revenue

By Eugene Harpole  
Attorneys for United States of America.

[Endorsed]: Filed Apr. 24, 1944. [40]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY UPON APPEAL FROM JUDGMENT OF APRIL 24, 1944

To Consolidated Rock Products Co., Union Rock Company, Consumers Rock & Gravel Company, Inc., and to their attorneys, Latham & Watkins:

You and Each of You will please take Notice under the provisions of Rule 75 (a) of the Rules of Civil Procedure for the United States District Courts that the Petitioner and Appellant intends to rely upon the following points in the appeal of the above-entitled case:

I.

The District Court erred in its Judgment of April 24, 1944 by holding the debtor was entitled, in determining its net taxable income for the calendar year 1938, to deduct as expenses of the operation of its business, the depreciation and depletion of properties and the amortization of leaseholds sustained by the properties of seven so-called owning [41] companies, to-wit: Consumers Rock & Gravel Company, Inc. (Delaware), Union Rock Company (Delaware), Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company (Delaware), Atlas Mixed Mortar Company, and Union Rock Land Company, for the reason that the evidence before the Court, the Findings of Fact and Conclusions of Law disclose that the properties and leaseholds upon which depreciation, depletion and amortization have been allowed the debtor, Consolidated Rock

Products Company, were not owned by it, at any time during the taxable year 1938.

## II.

The District Court erred in its Judgment of April 24, 1944, in holding that in determining the amount of depreciation and depletion of properties and amortization of leaseholds, to which the debtor contends it is entitled upon the properties and leaseholds of its subsidiaries, no account shall be given a certain "Modification of Operating Agreement" entered into by the debtor and certain of its subsidiaries under the date of February 16, 1933, in that the evidence before the Court disclosed that said Modification of Operating Agreement was duly executed by Consolidated Rock Products Company and its said subsidiaries and there was no competent evidence before the Court of its rescission by the parties thereto.

## III.

The District Court erred in its Judgment of April 24, 1944 for the reason that the evidence before the Court disclosed that no part of the depreciation, depletion or amortization of leaseholds mentioned in said Judgment, accrued as a liability on the debtor's part at any time during the calendar year 1938.

## IV.

The District Court erred in its Judgment of April 24, 1944, in holding that the debtor is entitled to a deduction, in determining its net taxable income for the calendar year 1938, of the amount of interest which accrued during said year 1938 on account of the default by the [42] debtor of its subsidiaries in the payment of interest which



had accrued in prior years on bonds issued by certain subsidiaries of the debtor, for the reason that the evidence and the Court's Order of December 23, 1942 disclose that no such interest accrued against or was paid by the debtor during the taxable year of 1938.

#### V.

The District Court erred in its Judgment of April 24, 1944, in holding that the net taxable income of the debtor for the calendar year 1938 is \$3,036.02 in that the evidence before the Court required a determination that the taxable net income of the debtor for said year was not less than \$133,759.17.

#### VI.

The District Court erred in its Judgment of April 24, 1944, by holding that there is due to the United States and unpaid from the debtor as income taxes and interest for the year 1938 only the sum of \$441.17, plus accruing interest, for the reason that the evidence before the Court required a determination that the sum of at least \$21,967.30, with interest as provided by law, is due and unpaid to the United States from the debtor as income taxes for the calendar year 1938.

#### VII.

The District Court erred in its Supplemental Finding of Fact Number III for the reason that said finding is not supported by the evidence before the Court and the evidence disclosed that no sum accrued against the debtor

during the taxable year 1938 as interest upon defaulted interest.

### VIII.

The District Court erred in making its Supplemental Findings of Fact Numbered VI, VII and VIII for the reason that the evidence before the Court disclosed that no part of the depreciation, depletion or amortization of leaseholds mentioned in said findings of fact had actually accrued as a liability on the debtor's part at any time during the calendar year 1938. [43]

### IX.

The District Court erred in making its Supplemental Findings of Fact Numbered VI, VII and VIII, and in determining that the debtor was entitled to deduct any part of the depreciation, depletion or amortization of leaseholds mentioned in said Findings as an expense in determining its taxable net income for the calendar year 1938, for the reason that the evidence before the Court discloses that none of the properties upon which depreciation, depletion and amortization is allowed to the debtor were ever owned by it at any time.

### X.

The District Court erred in adopting its Supplemental Conclusion of Law Numbered II for the reason that said Conclusion of Law is contrary to the evidence before the Court and is not supported or justified by the Findings of Fact made by the Court.

XI.

The District Court erred in adopting its Supplemental Conclusions of Law Numbered IV and V for the reason that said Conclusions of Law are contrary to the evidence before the Court and are not supported or justified by any or all of the Findings of Fact made by the Court.

XII.

The District Court erred in making and entering its Judgment of April 24, 1944, for the reason that said Judgment is not supported or justified by the Conclusions of Law adopted, the Findings of Fact made or the evidence before the Court.

Dated: this 3rd day of May, 1944.

CHARLES H. CARR,

U. S. Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Appellant.

[Endorsed]: Filed May 4 - 1944. [44]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

To the Clerk of the District Court of the United States  
for the Southern District of California, Central Di-  
vision:

You are requested to include the following in the Rec-  
ord on Appeal from the Judgment of the District Court  
of April 24, 1944, herein:

1. The contents of the Record on Appeal from the  
Order of the District Court of October 30, 1944, as  
designated therein. (By reference.);
2. Supplemental Findings of Fact and Conclusions of  
Law, entered by District Court on April 24, 1944;
3. Judgment on claim of United States for 1938 in-  
come taxes, entered by District Court on April 24,  
1944.
4. Minute Order of District Court of December  
23, [45] 1942, (found in Volume 49, Pages 4802 to  
4824 of Reporter's Transcript of Testimony and  
proceedings.);
5. Statement of testimony given by Wilbur E. Thain,  
on March 27, 1944;
6. Debtor's Exhibit 1. (Introduced April 24, 1944);
7. Notice of Appeal;



8. Statement of points upon which appellant will rely upon Appeal;
9. This designation.
10. Stipulation for consolidation of records.
11. Certificate of the Clerk to Transcript of Record;

Dated this 3 day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Asst. United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant.

[Endorsed]: Filed May 4 - 1944. [46]

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF ADDITIONS TO  
APPELLANT'S RECORD ON APPEAL

To the Clerk of the District Court of the United States  
for the Southern District of California, Central Division:

In addition to the matters specified in Appellant's Designation of Contents of Record on Appeal from the Judgment of the United States District Court of April 24, 1944 herein, you are requested to include the following:

(1) That portion of the minutes of the proceedings of the United States District Court for the Southern District of California, Central Division, in the matter of Consolidated Rock Products Co., Debtor, et al., No. 25816-H, on Dec. 23, 1942, which constitutes the Court's minute order directing payment by debtor [47] of interest on defaulted interest and specifying the rate of interest payable on certain bonds of a subsidiary corporation.

(2) The oral opinion and order with respect to the matters referred to in paragraph (1) above, which opinion and order are found in volume 49, pages 4802 to 4825 of the Reporter's Transcript of Testimony and Proceedings.

(3) This Designation.

Dated: This 12th day of May, 1944.

LATHAM & WATKINS

By Dana Latham

Attorneys for Appellees

[Endorsed]: Filed May 12, 1944. [48]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48 inclusive contain full, true and correct copies of: A Portion of Minute Order Entered December 23, 1942; Oral Opinion of the Court of December 23, 1942 being a portion of Reporter's Transcript Volume 49, Pages 4802 to 4824; Statement of Testimony of Wilbur E. Thain; Debtor's Exhibit 1; Supplemental Findings of Fact and Conclusions of Law; Judgment on Claim of United States of America against Debtor for Income Taxes for the Calendar Year 1938; Notice of Appeal; Statement of Points upon which Appellant Will Rely upon Appeal from Judgment of April 24, 1944; Appellant's Designation of Contents of Record on Appeal and Appellees' Designation of Additions to Appellant's Record on Appeal which, together with Transcript of Record on Appeal from the Order of October 30, 1944 certified this date and transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit from the Judgment Filed and Entered April 24, 1944.

Witness my hand and the seal of said District Court this 27 day of May, 1944.

[Seal]

EDMUND L. SMITH,  
Clerk

By Theodore Hocke  
Deputy Clerk.

[Endorsed]: No. 10785. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Consolidated Rock Products Co., a corporation, Union Rock Company, a corporation, and Consumers Rock & Gravel Company, Inc., a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 29, 1944.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.



In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 10785

UNITED STATES OF AMERICA,

Appellant,

- v -

CONSOLIDATED ROCK PRODUCTS CO.,

a Delaware corporation,

UNION ROCK COMPANY,

a Delaware corporation,

CONSUMERS ROCK & GRAVEL COMPANY, INC.,

a Delaware corporation,

Appellees.

STATEMENT OF POINTS RELIED UPON ON  
APPEAL

Appellant states that it intends to rely in its appeal, from the Judgment of April 24, 1944, upon the points mentioned in the statement of points relied upon by appellant and found at pages 41 to 44 inclusive of the Record upon said Appeal.

Dated: this 22nd day of May, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell

E. H. MITCHELL,

Asst. United States Attorney,

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant

Receipt of copy acknowledged May 27, 1944. Latham  
& Watkins, Dana Latham.

[Endorsed]: Filed May 29, 1944. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF  
RECORDS.

It is hereby stipulated and agreed by and between counsel for the appellant and appellee, subject to the approval of the court, that the appeal from the order of the District Court of the 30th day of October, 1943, may be consolidated with the appeal from the judgment of the District Court of April 24, 1944 in the above-entitled proceeding. That when said appeals are consolidated, the records may be printed and bound as one record.

Dated this 2nd day of May, 1944.

CHARLES H. CARR, U. S. Attorney  
E. H. MITCHELL, Asst. U. S. Attorney  
EUGENE HARPOLE, Special Attorney,  
Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Appellant

LATHAM AND WATKINS

By Dana Latham

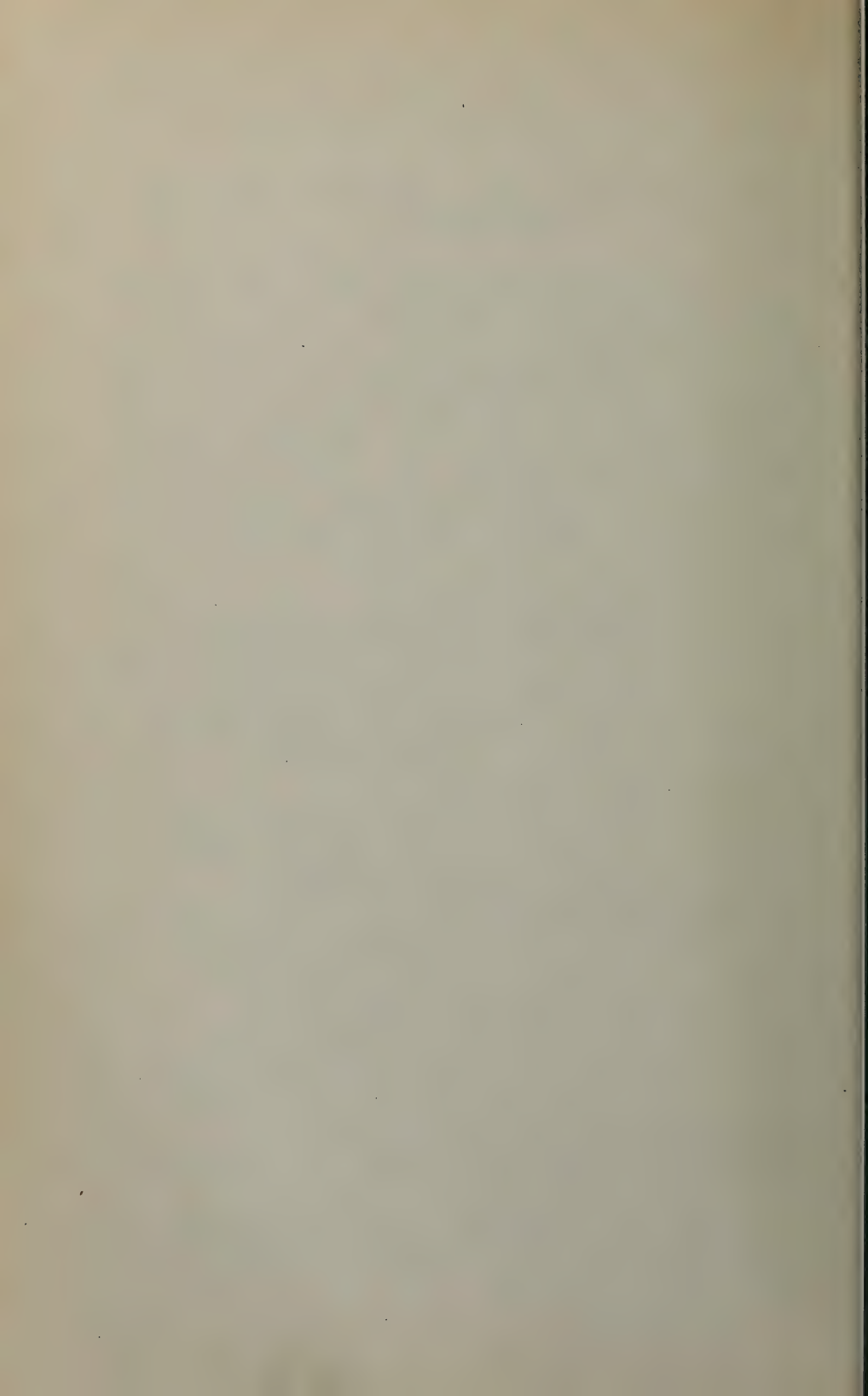
Attorneys for Appellee

It is so ordered this 6th day of May 1944.

William Denman  
U. S. Circuit Judge

[Endorsed]: Filed May 6, 1944. Paul P. O'Brien,  
Clerk.

[Endorsed]: Refiled May 29, 1944. Paul P. O'Brien,  
Clerk.





No. 10784-10785.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

CONSOLIDATED ROCK PRODUCTS Co., a Corporation;  
UNION ROCK COMPANY, a Corporation, and CON-  
SUMERS ROCK & GRAVEL COMPANY, INC., a Cor-  
poration,

*Appellees.*

Upon Appeal from the District Court of the United States  
for the Southern District of California,

## BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

*Assistant Attorney General.*

SEWALL KEY,

ROBERT N. ANDERSON,

MARY HELEN WIGLE,

*Special Assistants to the Attorney General.*

CHARLES H. CARR,

*United States Attorney.*

E. H. MITCHELL,

*Assistant United States Attorney.*

EUGENE HARPOLE,

*Special Attorney, Bureau of Internal Revenue.*

United States Postoffice and

Courthouse Bldg., Los Angeles (12),

**FILED**

DEC 19 1944

**PAUL P. O'BRIEN,**  
CLERK



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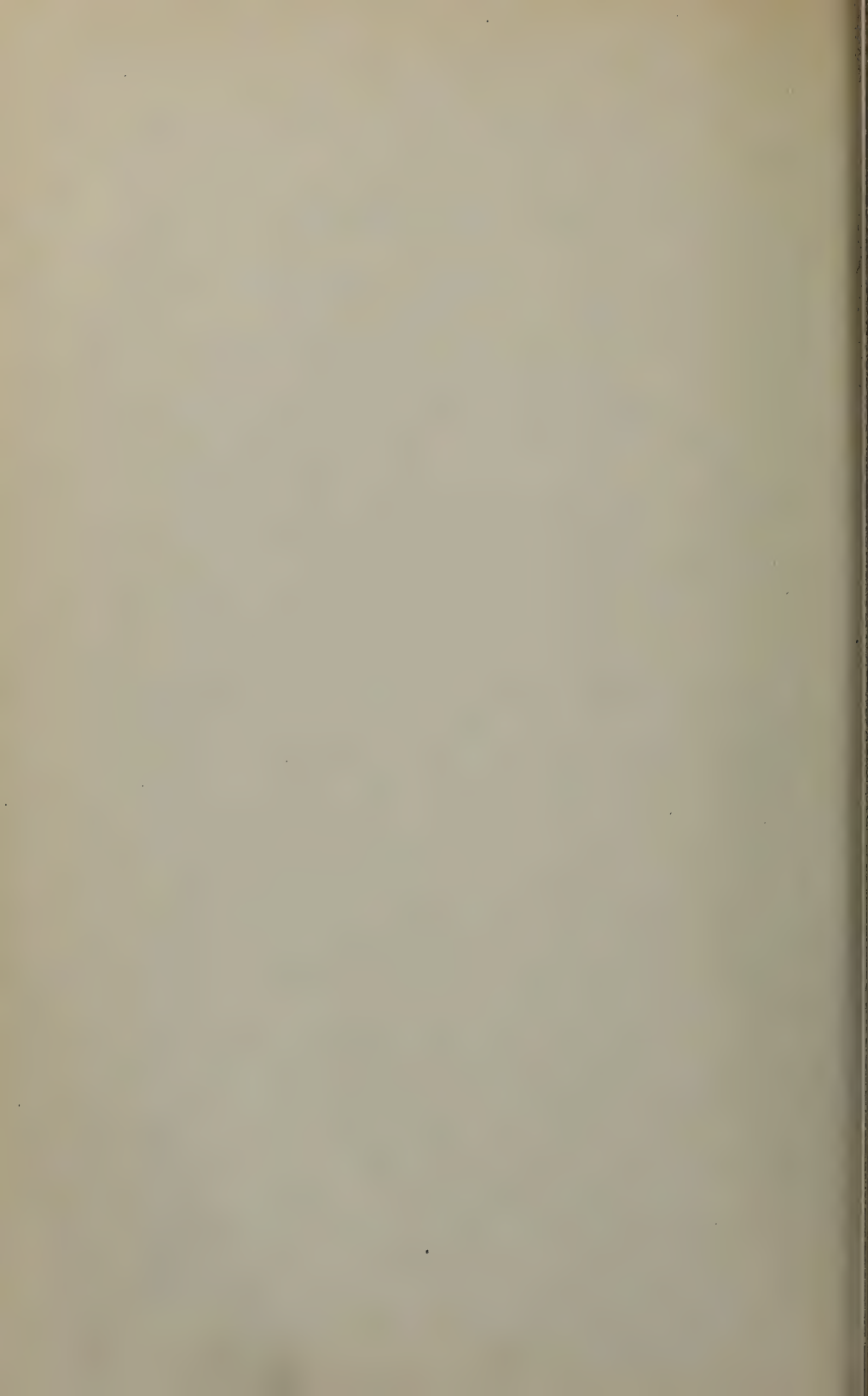
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No. 10784-10785.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

CONSOLIDATED ROCK PRODUCTS Co., a Corporation;  
UNION ROCK COMPANY, a Corporation, and CON-  
SUMERS ROCK & GRAVEL COMPANY, INC., a Cor-  
poration,

*Appellees.*

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## BRIEF FOR THE UNITED STATES.

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### Opinion Below.

The District Court did not render an opinion in this case;<sup>1</sup> its memorandum of conclusions will be found at pages 262-264 of the Record.

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<sup>1</sup>The court rendered an oral opinion [R. 301-319] relating to another issue concerned in the determination of the taxpayer's 1938 income tax liability. That opinion is of no moment here, except that by reason of the issue involved, the court entered judgment [R. 330-333] in favor of the United States for the sum of \$441.17 as additional income tax due for the year 1938.

### **Jurisdiction.**

This appeal involves an income tax deficiency assessment for the calendar year 1938 in the amount of \$25,112.72 and interest thereon [R. 334], claimed against the appellee, Consolidated Rock Products Company, which at all times here important to jurisdiction was the debtor corporation in proceedings under Section 77B of the Federal Bankruptcy Act, and subject as such to the jurisdiction of the District Court for the Central Division of the Southern District of California, the court from whose judgment [R. 330-333] this appeal is taken. The petition for leave to file claim for deficiency filed February 19, 1942, the order entered March 10, 1942, granting leave to file such claim, and the objections to allowance filed March 16, 1942, appear at pages 33-38 of the Record; the judgment of denial, except as to \$441.17, dated April 24, 1944, appears at pages 330-333 of the Record. Within three months, to-wit on April 24, 1944, the Collector filed notice of appeal to this Court [R. 334], pursuant to the provisions of Section 128(a) of the Judicial Code as amended.

### **Question Presented.**

During the year 1938, the taxpayer corporation operated seven subsidiaries under agreements which provided in part for parent to pay to each subsidiary all operating charges of the latter, including items of depreciation, depletion, and amortization. The taxpayer, which was on the accrual basis, accrued these included items on its books as a credit to the respective subsidiaries for the taxable year, but it never paid any of the amounts and was currently denying liability thereon.

The question is whether the District Court erred in allowing the taxpayer to deduct such amounts as "business expense" within the intendment of Section 23(a) of the Revenue Act of 1938.



### Statute Involved.

Revenue Act of 1938, c. 289, 52 Stat. 447:

#### SEC. 23. DEDUCTION FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

##### (a) *Expenses.*—

(1) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including \* \* \* rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

\* \* \* \* \*

(1) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. \* \* \*

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. \* \* \*

\* \* \* \* \*

### Statement.

The pertinent facts, taken from the original [R. 265-279] and supplemental [R. 325-327] findings of fact made by the District Court upon stipulation of the parties [R. 40-252] and upon oral evidence adduced by the taxpayer [R. 253-261, 320-322], may be stated as follows:

The taxpayer was at all times pertinent a Delaware corporation duly authorized to transact business in the State of California, its principal office being in the City of Los Angeles. [R. 266.] Both the taxpayer and the seven subsidiary corporations here concerned used the accrual system of accounting in making their Federal tax returns. [R. 271.]

In 1929 and 1930, the taxpayer entered into written "operating" agreements with the following five corporations, in all of which corporations it held the controlling interest directly or indirectly [R. 82-83]:

Union Rock Company (Delaware).  
Consumers Rock & Gravel Company, Inc.  
(Delaware).  
Reliance Rock Co.  
Sunset Rock Products Co., Inc.  
Builders Crushed Rock Products Co.

So far as here material the "operating" agreements between the parent and each of these subsidiary corporations were identical. [R. 266-269.] Their pertinent provisions were in substance as follows [R. 267-269]:

(a) A recital that economy and efficiency require the operation of the properties of the owning companies, i.e., the subsidiaries, under one operating organization. [R. 267.]

(b) The parent acquired outright all current personality of the subsidiary companies. [R. 267.]

(c) The parent assumed all the liabilities of the various subsidiary companies except those based on the purchase of materials, which liabilities the parent could accept or reject at its option. [R. 267.]

(d) Ownership of all fixed assets remained in the subsidiary companies. However, the operating agreement vested "in the operating company for the term hereof the possession and custody" of such assets. [R. 267.]

(e) The parent was authorized to make capital additions to the subsidiaries.<sup>2</sup> [R. 267.]

(f) The parent was required to pay all operating expenses pertaining to the subsidiaries' properties including [R. 267-268]—

all other operating charges and expenses of the owning companies of every sort and nature, including items of depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the owning companies and shall be paid to said owning companies as and when provided in Section 14 hereof, and in consideration thereof the operating company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties.

(g) The parent company was required to return at the conclusion of the agreement the capital properties belonging to the subsidiary corporations [R. 268]—

in substantially the same condition as when received by the operating company, appropriate allowance

---

<sup>2</sup>This was done from time to time by the parent. [R. 267.]

being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to.

(h) The operating agreement was to remain in effect until terminated by thirty days' written notice by either the subsidiary companies to the parent company or vice versa. [R. 268.]

(i) Upon the termination of the operating agreement, the properties belonging to the subsidiary companies were to be returned to them and [R. 268-269]—

a financial adjustment shall be made as between the operating company and any such owning company or companies in accordance with the current account of the parties on date of return of said properties and payment shall thereupon be made in accordance therewith.

Immediately upon the execution of the operating agreements hereinbefore referred to "current accounts" were established on the parent corporation's books for each of the five "owning" subsidiary corporations. [R. 269.] At regular monthly intervals beginning at the date of each operating agreement, amounts representing depreciation, depletion and amortization of leaseholds covering both assets originally possessed by each subsidiary corporation, and capital expenditures made on the assets by the parent corporation were determined. These items were set up by the parent on its books as an expense of operation and the credit was actually made to the current account of each subsidiary company for those amounts representing depreciation, depletion and amortization applicable to such assets. The amount of these items appeared on the



debtor's books at the close of each month from the beginning up to and including the month of December, 1938, and at the close of the year 1938 as an unqualified liability to each subsidiary company. [R. 270-271.]

The books of account of each subsidiary company for the same period also showed the amounts representing depreciation, depletion and amortization of leaseholds as a definite and unqualified account receivable and as an asset due from the parent corporation. [R. 271.]

The procedure hereinbefore referred to with respect to the fixed assets owned by the aforementioned five subsidiary corporations covered by these operating agreements was followed precisely with respect to the assets of two other subsidiary companies whose stock was also controlled directly or indirectly by the taxpayer corporation, namely, Union Rock Land Company, a wholly owned subsidiary of Union Rock Company (Delaware) and Atlas Mixed Mortar Company. There was no written operating agreement covering the purchase and use of the properties of the last two named subsidiary corporations, but the treatment accorded these companies and their assets was in all respects identical with that accorded the five subsidiary corporations hereinbefore mentioned. [R. 271-272.] The conduct of the parties indicated that they intended and did enter into a contract covering the ownership and use of properties of the Union Rock Land Company and Atlas Mixed Mortar Company for all purposes here material identical with the terms of the written operating agreements with the five other above-named subsidiary corporations. [R. 272.]

Under date of February 16, 1933, taxpayer parent corporation entered into an agreement with Union Rock Company (Delaware), Consumers Rock & Gravel Company,

Inc. (Delaware), and Reliance Rock Company (Delaware), which agreement was termed a "Modification of Operating Agreement." No similar agreement was ever entered into between the parent and any of the other subsidiary corporations. [R. 272.]

The so-called modification agreement of February 16, 1933, provided in part [R. 273]:

(a) Depreciation (including depletion and amortization) was to be actually credited only upon the termination of the agreement. Its amount was then to be determined by appraisers to be appointed by the contracting parties and was to be based on values and rates determined as of April 1, 1929, and each succeeding year during the life of the operating agreement. [R. 273.]

(b) The term of the operating agreement was to be five years from February 16, 1933, except that [R. 273]—  
operating [parent] company is hereby given the option to extend said operating agreement as hereby modified for a further term of five years upon the same terms and conditions provided that notice of its intention to extend said term is given to each of the owning companies within one year of the date of expiration of the original term in this paragraph specified.

No notice of an extension as hereinbefore referred to was ever given, nor was any agreement made with respect thereto. [R. 273.]

The so-called Modification of Operating Agreement was ignored for all purposes by all the parties thereto. No change of any kind or nature was made by any party to the modification agreement in the accounting procedure theretofore established in the original operating agreement. The parent corporation continued to credit amounts repre-

senting depreciation, depletion and amortization of leaseholds monthly to each subsidiary exactly in accordance with the provisions of the original operating agreements. [R. 273-274.]

When the five year term provided for by the so-called "modification" expired, no appraisers were appointed and no effort was made to determine the debtor's liability for depreciation as provided therein and nothing was ever done with respect thereto. The conduct of the parties to the modification of February 16, 1933, indicated that they intended to and did in fact immediately rescind that modification agreement by complete abandonment of its terms; for the purpose of this proceeding that agreement never became operative. [R. 274.]

On May 24, 1935, petitions for re-organization under Section 77B of the Bankruptcy Act of the parent corporation and two of its subsidiaries, i.e., Union Rock Company (Delaware) and Consumers Rock & Gravel Company, Inc. (Delaware), were filed in this District Court. By appropriate order the parent was temporarily continued in possession of the assets of these corporations. No petition involving receivership, bankruptcy or re-organization was ever filed covering the remaining subsidiary corporations. [R. 274.] Under date of July 2, 1935, the court by appropriate order continued the parent in possession of all of the subsidiaries' properties until further order, including those of the two with which there was no written operating agreement; the court never entered any contrary order. [R. 275.]

The "continue in possession" order of July 2, 1935, in substance authorized the parent to continue existing business and financial agreements, arrangements and relations between the parents and its subsidiaries "to the extent that they may be necessary or advisable in order that the



properties of the debtor and its subsidiary corporations may be operated as nearly as possible under the same policy of management." The order of July 2, 1935, remained in full force and effect at all times pertinent hereto. [R. 275.]

Upon the filing of the petition for re-organization the books of account of the parent and the subsidiaries, Union and Consumers, were closed as of May 24, 1935 were the end of the subsidiaries' fiscal years. New accounts were thereupon set up beginning May 25, 1935. Prior accounting practices were followed exactly with respect to all of the subsidiary corporations. The current accounts of the subsidiary corporations and the parent corporation continued to be credited and debited monthly with amounts representing depreciation, depletion and amortization as heretofore set forth. In so conducting its affairs the parent corporation complied with the order of the District Court dated July 2, heretofore referred to. [R. 275-276.]

In their federal income tax returns for the year 1938, each of the subsidiary corporations took deductions for the amount of depreciation, depletion and amortization which had been credited to the respective accounts by the taxpayer parent corporation. In its federal corporation income and excess-profits tax return for the calendar year 1938 the parent deducted an item entitled "Expenses paid for subsidiaries—\$484,214.40." This amount included an item entitled "Expenses paid for subsidiaries" totaling \$215,917.64, representing depreciation, depletion and amortization with respect to the properties of the seven subsidiary corporations. These amounts were computed in accordance with the provisions of the various operating agreements. [R. 276.] The United States, the claimant herein, disallowed as deductible expenses to the parent corporation all of the amount of \$215,917.64 and adjusted



the parent corporation's taxable income for the year 1938 accordingly; and based upon that adjustment the United States on November 28, 1941, assessed against the parent corporation additional income taxes for the calendar year 1938 in the amount of \$25,112.72 plus interest in the amount of \$4,071.70. [R. 276.]

The stipulation of facts provided that only questions of law raised by the United States as claimant should be covered in the hearings on the tax claim. It was not conceded by the claimant that if the court should find the parent to be entitled to deduct the items aforementioned, the amounts of such depreciation, depletion and amortization had been correctly computed and determined by the debtor corporation. It was further stipulated that if the court should determine the parent corporation to be entitled to deduct these items, the amount of the deductions should either be agreed to by the parties or absent such agreement determined by the court in a subsequent proceeding. [R. 278-279.]

The District Court's conclusions of law recited [R. 280]:

The debtor is entitled, in determining its net taxable income for the calendar year 1938, to deduct as expenses of operation the depreciation, depletion and amortization of leaseholds sustained by said seven owning companies heretofore referred to, the properties of which were used and operated during said calendar year 1938 by the debtor herein in connection with its business.

After entry of order [R. 282-285] based on such conclusion and further hearing had upon an issue not material here (except that pursuant to its decision thereon the court adjudged [R. 329] there to be due to the

United States additional income taxes for the year 1938 in the principal sum of \$441.17 together with interest), the amount which the debtor in ascertaining its net taxable income for the year 1938 was entitled to deduct with respect to all of these controverted items was determined to be the sum of \$78,539.30. [R. 327-328.]

### Statements of Points to Be Urged.

The District Court erred in holding that the items here involved were "business expenses" of the taxpayer properly accrued and deductible in the year 1938; the court erred in failing to hold that those items were a contribution by the taxpayer parent corporation to the capital of the respective subsidiary corporations.

### Summary of Argument.

The taxpayer parent corporation was not entitled to deduct the amounts of its subsidiaries' 1938 depreciation, depletion, and amortization as "business expense" under Section 23(a)(1) of the Revenue Act of 1938. In the first place, the amounts were not expenses of the parent's business; correctly classified, they were in the nature of contributions by the parent to the capital of the subsidiaries.

But more importantly, even if these items could be classified as business expense, they were not proper deductions of the year 1938. The taxpayer, which used the accrual basis of accounting, was currently denying that it owed its subsidiaries anything under the operation agreements on any count, or asserting that if it had a liability to them, the amount thereof could not be determined. A taxpayer on the accrual basis is never entitled to deduct an item of expense unless and until its liability to pay such item becomes fixed and determined.

## ARGUMENT.

### **The Parent Corporation Was Not Entitled to Deduct the Amounts of Its Subsidiaries' 1938 Depreciation, Depletion, and Amortization, as Business Expense or Otherwise.**

It is manifest that since the subsidiary corporations concerned in this case took deduction for depreciation, depletion, and amortization during the taxable year in the amounts here in controversy, the taxpayer corporation which owned the controlling interest in each of the subsidiary corporations, could not itself take deduction therefor; the revenue law does not countenance double deductions in whatever guise. See *Ilfeld Co. v. Hernandez*, 292 U. S. 62. Neither could the parent corporation take deduction therefor irrespective of the subsidiaries' tax-treatment of the items; parent and subsidiaries were separate entities as is evidenced of course by their contracting together, and the operating agreements distinctly show [R. 267] that the parent had no interest in the fixed assets of the subsidiaries beyond the right of custody during the life of the operating contract. The Supreme Court early declared in *Weiss v. Wiener*, 279 U. S. 333, 336, that in order to be entitled to a deduction for depreciation, the taxpayer "must show an interest in the property and a present loss to him." The only interest here and the only present loss which the taxpayer suffered by reason of the depreciation, etc., of the subsidiaries' properties was entirely derivative in character; a loss to a corporation is not a loss for which its stockholders are entitled to deduction. In *re Park's Estate*, 58 F. 2d 965 (C. C. A. 2d), certiorari denied, 287 U. S. 645; *First Nat. Bank in Wichita v. Commissioner*, 46 F. 2d 283 (C. C. A. 10th), certiorari denied, 287 U. S. 636.



But the taxpayer maintains, and this contention was sustained below, that these items were deductible by the parent corporation as business expenses arising out of the operating agreements; specifically, it is the taxpayer's position that for the use of the subsidiaries' properties it agreed to pay rent or compensation measured in part by the amount of depreciation, etc., on the affiliates' assets as specified in the operating contracts. Rent is of course an item of business expense, and deductible as such under Section 23(a)(1), *supra*. But preliminarily we point out, that while the District Court allowed the deductions as "business expense," it did not do so on the theory that they were a measurement of rent. The conclusions of law recite [R. 280]:

The debtor is entitled, in determining its net taxable income for the calendar year 1938, *to deduct as expenses of operation the depreciation, depletion and amortization of leaseholds sustained by said seven or nine companies heretofore referred to, the properties of which were used and operated during said calendar year 1938 by the debtor herein in connection with its business.* (Italics supplied.)

Thus it appears that the court below actually permitted the deduction upon the basis that the depreciation, etc., of the subsidiaries was an allowable "expense of operation" to the parent. We submit that this was clearly an erroneous concept of the ambit of "business expense" as the term is used in the federal revenue law. In our view, these amounts were in the nature of capital contributions from parent to subsidiary; they were not "business expense" within the meaning of Section 23(a)(1) either under the theory upon which the District Court founded its judgment, or upon the taxpayer's thesis that they were rentals.



But if, momentarily, we accept the contention that these items were "business expense" to the taxpayer corporation within the meaning of Section 23(a)(1) under either the court's or the taxpayer's theory, it by no means follows that as such they were proper deductions for the year 1938. The taxpayer and its affiliates used the accrual system of accounting. Had the taxpayer been on the cash basis, it is plain that it would not have been entitled to deduct these amounts because it never paid them; under the accrual system, it could deduct them only if they represented a fixed and determined liability of the taxable year. We propose now to show that they did not.

The taxpayer and two of its subsidiaries were in the midst of reorganization proceedings under Section 77B of the Federal Bankruptcy Act, the petition having been filed in the court below on May 24, 1935, and the court in July of that year having entered an appropriate order continuing the debtor in possession of the properties and authorizing it to carry on all of its existing business and financial agreements, which order remained in force at all times pertinent to this controversy. [R. 274, 275.] A plan of reorganization submitted on March 15, 1937, by the debtor corporation, the taxpayer herein, called for the formation of a new corporation to which the assets of the petitioner corporations would be transferred free of the claims of all except general creditors. For reasons not here pertinent, a bondholder, one Du Bois, among other interested parties, filed objections to the plan, but these were overruled and the court below confirmed the plan on September 8, 1938. Appeal was taken and the order was reversed by this Court on June 19, 1940. In *re Consolidated Rock Products Co.*, 114 F 2d 102. The case was carried to the Supreme Court of the United States where

the order of reversal was affirmed March 3, 1941.<sup>3</sup> *Consolidated Rock Co. v. Du Bois*, 312 U. S. 510.

Throughout this litigation, which involved construction of the original operating agreements under which the taxpayer claims the right to the deduction here in question, and the modification agreement of February, 1933, which it claims and which the court below found [R. 272-274] had never become effective, the debtor corporation wavered between denying liability to its subsidiaries on any count and asserting that if liability existed the amount thereof was impossible of determination. It insisted that at all events the amount of liability to the affiliates by reason of the items of depreciation, depletion, and amortization here concerned,<sup>4</sup> was not then determinable. The taxpayer's brief in the Supreme Court is illuminating; it states at one point (p. 14):

On the other hand, the preferred stockholders take the position that the agreement of 1933 is neither void nor voidable, that any rights must be determined by the agreement as modified, and that, at most, the rightful claim of Consumers and Union is for an indefinite amount, the payment of which, when determined, Consolidated could properly defer, for the most part, until 1953.

And at another point, it is argued [Br. 16-17]:

From all of this, how can it be said that the preferred stockholders are unreasonable in denying the existence of any present liability under the operating agreement. Rather it seems that any unreasonable-

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<sup>3</sup>The Government's petition to file this tax claim was filed on February 19, 1942 [R. 33-34], and the claim was denied, except as hereinbefore stated, on April 24, 1944 [R. 333].

<sup>4</sup>And for other years.

ness lies on the side of the respondent in asserting that a present liability exists.

The taxpayer demonstrated clearly and effectively to the Supreme Court that any claim which the subsidiaries might have was vague and indefinite almost to the vanishing point. Mr. Justice Douglas, who is the author of the opinion in that proceeding, said (pp. 518-520):

In spite of that finding, the District Court also found that "it would be physically impossible to determine and segregate with any degree of accuracy or fairness properties which originally belonged to the companies separately"; that as a result of unified operation properties of every character "have been commingled and are now in the main held by Consolidated without any way of ascertaining what part, if any thereof, belongs to each or any of the companies separately"; and that, as a consequence, an appraisal "would be of such an indefinite and unsatisfactory nature as to produce further confusion."

The unified operation which resulted in that commingling of assets was pursuant to an operating agreement which Consolidated caused its wholly owned subsidiaries to execute in 1929. Under that agreement the subsidiaries ceased all operating functions and the entire management, operation and financing of the business and properties of the subsidiaries were undertaken by Consolidated. The corporate existence of the subsidiaries, however, was maintained and certain separate accounts were kept. Under this agreement Consolidated undertook, *inter alia*, to pay the subsidiaries the amounts necessary for the interest and sinking fund provisions of the indentures and to credit their current accounts with items of depreciation, depletion, amortization and

obsolescence. Upon termination of the agreement the properties were to be returned and a final settlement of accounts made, Consolidated meanwhile to retain all net revenues after its obligations thereunder to the subsidiaries had been met.

And again at page 521 the Court's opinion states:

If as Consolidated maintains the subsidiaries have no present claim against it, the claim can readily be discounted to present worth.

Accordingly, on the taxpayer's own contention respecting these items, as reflected in its brief and in the Supreme Court decision, the alleged items of expense here concerned did not accrue as a deduction in the taxable year 1938. Long since the Supreme Court established the rule that income and expense items "accrue" to a taxpayer only when there arises in him a fixed and unconditional right to receive, or a fixed and unconditional obligation to pay; so long as the right to receive or the obligation to pay is not certain or is contingent, the item has not accrued. The uncertainty must be resolved; the determining event must be awaited. These principles have been acknowledged in cases involving a wide variety of income and expense items; representative examples of such decisions appear in the margin.<sup>5</sup> In fact, after the judgment of

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<sup>5</sup>*United States v. Safety Car Heating Co.*, 297 U. S. 88; *Spring City Co. v. Commissioner*, 292 U. S. 182; *Brown v. Helvering*, 291 U. S. 193; *Burnet v. Huff*, 288 U. S. 156; *North American Oil v. Burnet*, 286 U. S. 417; *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115; *Lucas v. American Code Co.*, 280 U. S. 445; *Triplex Safety Glass Co. of North America v. Latchum*, 131 F. (2d) 1023 (C. C. A. 3d); *London-Butte Gold M. Co. v. Commissioner*, 116 F. (2d) 478 (C. C. A. 10th); *H. Liebes & Co. v. Commissioner*, 90 F. (2d) 932 (C. C. A. 9th); *Commissioner v. Brooklyn R. S. Corp.*, 79 F. (2d) 833 (C. C. A. 2d); *Umsted v. Commissioner*, 72 F. (2d) 328 (C. C. A. 8th); *Commissioner v. Southeastern Express Co.*, 56 F. (2d) 600 (C. C. A. 5th); *Kentucky & Indiana T. R. Co. v. Commissioner*, 54 F. (2d) 738 (C. C. A. 6th); *Central Power Co. v. United States*, 44 F. Supp. 596 (C. Cls.).



the District Court herein was entered, the Supreme Court had occasion to re-examine and reaffirm this rule with respect to a state tax claim, liability for which the taxpayer was contesting during the tax period for which deduction was sought. *Dixie Pine Co. v. Commissioner*, 320 U. S. 516. In denying the deduction, the Supreme Court declared (p. 519):

It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid: and this cannot be the case where the liability is contingent and is contested by the taxpayer. Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated.

The Government submits that this language applies with equal force to, and is equally dispositive of, the issue at bar.

In the light of the foregoing, it seems almost a superfluity for the Government now to argue that the items here concerned were not even "business expense," much less deductible as such in the circumstances of this case under the firmly-established principles of federal tax law which we have just discussed. Nevertheless, we point out that similar claims to deduction as "business expense" have been frequently rejected by the courts on the ground that they were in reality akin to capital contributions. It

should be remembered that the taxpayer held controlling interest in the stock of all of these affiliates; it was to its interest that provision be made for eventual replacement of their properties, and it seems evident that this was the purpose of the operating agreement provisions pertaining to depletion, depreciation, etc., suffered by the subsidiaries. Cf. *Majestic Securities Corp. v. Commissioner*, 120 F. 2d 12 (C. C. A. 8th); *Pennsylvania Indemnity Co. v. Commissioner*, 77 F. 2d 92 (C. C. A. 3d).

The Tax Court has consistently classified expenditures analogous to the kind of items involved here as contributions to capital. Thus in *Cambridge Apartment Building Corp. v. Commissioner*, 44 B. T. A. 617, the then Board of Tax Appeals denied that that portion of an assessment made against stockholder-tenants of an apartment building used for the retirement of the assessor's bonds was income to the corporation; the Board held that a capital contribution had been made by the shareholders. Accord: 874 *Park Avenue Corp. v. Commissioner*, 23 B. T. A. 400; *Paducah & Illinois Railroad Co. v. Commissioner*, 2 B. T. A. 1001. And cf. *Gatlin v. Commissioner*, 34 B. T. A. 50; *Bank of California, National Assn. v. Commissioner*, 30 B. T. A. 556; *Burns v. Commissioner*, 11 B. T. A. 524; *Paxton v. Commissioner*, 7 B. T. A. 92; *Lutz v. Commissioner*, 2 B. T. A. 484.

In *Interstate Transit Lines v. Commissioner*, 130 F. 2d 136 (C. C. A. 8th), the taxpayer corporation sought to take a loss deduction for the operating deficit of its wholly-owned subsidiary, having contracted with the subsidiary *inter alia* to underwrite the latter's operating expenses. The court denied the deduction, saying (p. 140):

We also agree with the Board that the payment by the petitioner of the deficit of the subsidiary was a

capital expenditure, not an ordinary and necessary expense of the petitioner's business.

The conditions which distinguish a capital investment from an ordinary and necessary business expense in cases where a stockholder contributes something to his corporation have been settled, not by unanimity of decision, but by clear weight of authority. [Cases cited in the margin omitted.] If the contribution (1) is a benefit to or has value to the stockholder and (2) becomes an asset of the corporation when transferred to it, the stockholder increases his capital investment in the corporation, and the payment is not a deductible business expense. Whether such payment was made by reason of a contractual obligation or was merely a voluntary act does not affect the result.<sup>6</sup>

And while in the *Interstate Transit case*, it was the subsidiary who was "operating" on behalf of the parent, whereas here it was the parent who was "operating" the subsidiaries, the principle of law remains precisely the same. In each case the stockholder was making a contribution to the permanent capital structure of the corporation.

The items here involved were not "business expense" of the taxpayer corporation within the meaning of Section 23(a)(1). But even if they were in that category, they were nevertheless non-deductible in the year 1938, for they were not fixed and determined liabilities of that tax period.

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<sup>6</sup>This decision was affirmed in the Supreme Court. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590. That Court did not find it necessary to decide, however, whether the item was properly classifiable as a capital contribution it held that since the subsidiary's operations were not a part of the parent taxpayer's business, the former's deficit was not a deductible loss to the latter.

### Conclusion.

The judgment of the District Court should be reversed except as to \$441.17, which amount the court determined to be due to the Government upon other grounds.

Respectfully submitted,

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December, 1944.



No. 10784-10785

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

CONSOLIDATED ROCK PRODUCTS Co., a Corporation;  
UNION ROCK COMPANY, a Corporation, and CON-  
SUMERS ROCK & GRAVEL COMPANY, INC., a Corpora-  
tion,

*Appellees.*

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## BRIEF FOR APPELLEES.

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**FILED**

JAN 15 1945



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## BRIEF FOR APPELLEES.

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### Preliminary Statement.

In this proceeding appellant seeks to reverse a judgment of the District Court for the Southern District of California.

As the two numbers indicate, there were two appeals (1) [R. 286] from a judgment of October 30, 1943 [R. 282-285] which constitutes No. 10784; and (2) the appeal [R. 334] from the judgment of April 24, 1944 [R. 330-333]. By stipulation of the parties dated May 6, 1944 [R. 347], said appeals were consolidated and the records in each were accordingly printed as one record.

The reasons for the two appeals are as follows :

Under a written stipulation of the parties [R. 47] the Trial Court first heard the issue as to whether or not appellee, Consolidated Rock Products Co., could deduct in determining its 1938 Federal income tax liability *any* amounts measured by the depreciation, depletion and amortization sustained by its subsidiary companies with respect to the latter's properties, which properties were used by Consolidated in its business.

On June 23, 1943, the Trial Court found for appellees with respect to this legal issue, saying in part [R. 263-264] :

“ . . . The principal, if not the sole, ground upon which the Government contends that the debtor was not entitled to take the deductions mentioned is that the amounts included therein constituted capital contributions from the debtor to its subsidiaries. We are unable to agree with such contention. We are persuaded that the position of the debtor is sound, and that it was entitled to be credited with the deductions taken in its return for the year 1938.

“As heretofore noted it is still incumbent upon the parties to make a final computation respecting the amounts of such deductions.”

From this ruling appellant took the first appeal, No. 10784.

Thereafter a further hearing was held and the Trial Court found that the *specific amounts* which the taxpayer corporation was entitled to deduct in determining its 1938 income tax liability on account of the depreciation, depletion, and amortization of the properties used by taxpayer

in its business amounted to \$78,539.30 [App. Br. p. 12; R. 323, 325-328].

From this judgment appellant took its second appeal, No. 10785.

It should be noted, however, that appellant apparently does not object to the *amount* of the deduction allowed by the Trial Court. Instead, it objects to any allowance for said items or any of them.

### Opinion Below.

As stated by the appellant in its Brief, page 1, the District Court did not render a formal opinion in this cause. It is respectfully requested, however, that the Trial Court's Memorandum of Conclusions, which will be hereinafter referred to, be carefully read [R. 262-264].

### Jurisdiction.

The appellant in its Brief, page 2, has adequately discussed this point.

### Question Presented.

Appellees entirely disagree with appellant's concept (Br. p. 2) of the "Question Presented." Appellant says:

"During the year 1938, the taxpayer corporation *operated* seven subsidiaries under agreements which provided in part for parent to pay to each subsidiary all operating charges of the latter, including items of depreciation, depletion, and amortization. The taxpayer, which was on an accrual basis, accrued these included items on its books as a credit to the respective subsidiaries for the taxable year, but it never paid any of the amounts and *was currently denying liability thereon.*" (Emphasis supplied.)

*First:* As the record clearly shows, Consolidated Rock Products Co., the taxpayer corporation, did not “operate” the subsidiaries. Instead it carried on its own business, employing therein assets belonging to the subsidiaries. For the use of said assets in its business the taxpayer agreed to pay to the subsidiaries a sum to be measured by the various operating charges of the subsidiaries including the amount of depreciation, depletion, and amortization sustained by said subsidiaries with respect to their properties so leased and used by the parent.

Under the circumstances the question is whether or not the District Court erred in permitting Consolidated to deduct such amounts as business expenses within the purview of Section 23(a) of the Revenue Act of 1938.

*Second:* In alleging that the taxpayer “was currently denying liability” to its subsidiaries for said amounts, appellant *departs from* and seeks to *contradict* the record in this case. There is absolutely nothing in this record which by any stretch of the imagination justifies the assertion made. As a matter of fact, as will hereinafter be made abundantly clear, the Trial Court’s findings specifically negative the fact alleged.

But, even if the assertion under discussion is justified as a conclusion from the evidence at hand and is not inconsistent with the facts specifically found, appellant seeks nevertheless to inject here an issue not presented to or considered by the Trial Court.



Appellant's brief, therefore, presents the further questions:

(a) May appellant claim as a *matter of fact* that the taxpayer was denying liability for the items of depreciation, depletion, and amortization heretofore referred to; and,

(b) Assuming that it may, having failed to urge the legal effect thereof below, may it now raise and argue this point before this Court for the first time?

### Statement of Facts.

Appellant, of course, has accepted the various adjustments to Consolidated Rock Products Co.'s 1938 taxable income originally stipulated to by the parties before the Trial Court [R. 41, 42]. It is likewise clear that the appellant is not objecting to the Trial Court's allowance to Consolidated of an interest deduction for 1938 not theretofore allowed by appellant [R. 328]. Instead, appellant is only objecting to the items totaling \$78,539.30 representing the amounts of depreciation, depletion, and amortization sustained by Consolidated's subsidiaries with respect to the various properties owned by said subsidiaries and employed by Consolidated in its business operations during 1938.

Accordingly, the statement of facts which follows will be confined to matters affecting these last mentioned items. Said statement with inconsequential changes is taken verbatim from the Trial Court's findings of fact as set forth in the Record, pages 266-277 and 326-327.

(1) The appellee, Consolidated Rock Products Co., hereinafter referred to as Consolidated, and two of its subsidiaries, Consumers Rock & Gravel Company,

Inc., and Union Rock Company, are corporations incorporated under the laws of the State of Delaware and at all times here pertinent have been duly qualified to do and have been transacting business in the State of California; their principal places of business being located in the City of Los Angeles, County of Los Angeles, State of California, within the Sixth Collection District of the State of California.

(2) Consolidated at all times has been and is both an operating and "holding" company. By the term "holding" is meant the ownership of all or a portion of the stock of various subsidiary companies engaged in the same type of business.

The relationship between the various corporations heretofore referred to appears in the Record, pages 82-83. In some cases there are two corporations bearing the same name, one being organized under the laws of the State of California and the other under the laws of the State of Delaware. Where this situation occurs, said companies are distinguished one from the other by inserting after the name and in parentheses the State of incorporation.

(3) Under date of July 15, 1929, Consolidated entered into an "operating agreement" with Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware) [R. 96-111]. In said agreement Consolidated is described as the "operating company" and the various subsidiary companies as the "owning

companies.” Said agreement provided in part as follows:

(a) It is recited that economy and efficiency require the operation of the properties of the owning companies under one operating organization.

(b) Consolidated acquired outright all current assets (personalty) of the “owning” (subsidiary) companies.

(c) Consolidated assumed all the liabilities of the various owning companies except those based on the purchase of materials, which liabilities Consolidated could accept or reject at its option.

(d) Ownership of all fixed assets remained in the owning companies. Said operating agreement, however, vested “in the operating company for the term hereof the possession and custody” of said properties.

(e) Consolidated was authorized to make capital additions to the owner’s properties. This was done from time to time by Consolidated and these expenditures appear in Column 2 of the table appearing on pages 45 and 46 of the Record.

(f) Consolidated was required to pay all operating expenses pertaining to the owner’s properties, including:

“all other operating charges and expenses of the owning companies of every sort and nature, including items of depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay)

shall be credited to the current account of the owning companies and shall be paid to said owning companies as and when provided in Section 14 hereof, and *in consideration thereof the operating company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties.*" (Emphasis supplied.)

(g) The operating company was required at the conclusion of the agreement to return the capital properties belonging to the owning companies :

"in substantially the same condition as when received by the operating company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to."

(h) The operating agreement here under consideration was to remain in effect until terminated by thirty days' written notice by either the owning companies to the operating company or *vice versa*.

(i) Upon the termination of said operating agreement, the properties belonging to the owning companies were to be returned to them and

"a financial adjustment shall be made as between the operating company and any



such owning company or companies in accordance with the current account of the parties on date of return of said properties and payment shall thereupon be made in accordance therewith."

(4) Under date of July 15, 1929, Consolidated entered into a separate "operating agreement" with Builders Crushed Rock Products Company, in which the latter company was described as the "owning company" [R. 85-95]. Said agreement by its terms was substantially identical with that entered into between Consolidated and Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware), and heretofore referred to.

(5) On April 8, 1930, Consolidated entered into an "operating agreement" with Sunset Rock Products Company, Inc. [R. 112-123]. Said agreement by its terms was substantially identical with the two operating agreements of July 15, 1929, heretofore referred to.

(6) Immediately upon the execution of the three operating agreements heretofore herein referred to "current accounts" were established on Consolidated's books for each of said five "owning companies."

All current assets (personalty) owned by said owning companies were taken over by Consolidated and credits to the full value thereof were set up on its books for the account of each owning company. At the same time the liabilities of each of the owning companies were taken over by Consolidated and the

amount thereof charged on its books against the owning company. If the owning company's liabilities so assumed exceeded in amount the assets so acquired, there was a net charge against each owning company in the current account for each carried on Consolidated's books. If said assets exceeded said liabilities a credit to each owning company was set up on the books of Consolidated.

(7) Complementary entries were made on the books of each subsidiary or owning company. Appropriate credits and charges were made to and against Consolidated. Where current assets were acquired by Consolidated the accounts of the subsidiary reflecting said assets were closed out. The same was true with respect to the liabilities of the subsidiary taken over by Consolidated.

(8) Where capital additions were made by Consolidated to the owning company's fixed or capital assets, the amount thereof was charged on Consolidated's books to the current account of each subsidiary. Likewise, the owning companies on their books credited Consolidated with such amounts.

(9) At regularly monthly intervals beginning at the date of each operating agreement, amounts representing depreciation, depletion and amortization of leaseholds covering both assets originally possessed by each owning company and capital expenditures made on said assets by Consolidated were determined. These items were set up by Consolidated on its books as an expense of operation and a credit actually made to the current account of each owning company for said amounts representing depreciation, depletion and

amortization applicable to said assets. The amount of these items appeared on Consolidated's books at the close of each month from the beginning to the present, including each month of the year 1938 and at the close of the year 1938 as an unqualified liability to each subsidiary or owning company.

The books of account of each owning company for the same period also showed said amounts representing depreciation, depletion and amortization of leaseholds as a definite and unqualified account receivable and an asset due from Consolidated.

(10) During this entire period and including the year 1938 Consolidated and all of said owning companies (including those to be referred to in the succeeding paragraph hereof) maintained their books of account and prepared and filed their Federal income tax returns on what is known as the "accrual" basis. Said entries were made and said accounting procedure heretofore specified was followed in accordance with the terms of the operating agreements heretofore referred to herein.

(11) The procedure heretofore referred to with respect to the fixed assets owned by the five operating companies covered by said operating agreements was followed exactly with respect to the assets of two other subsidiary companies of Consolidated, namely, Union Rock Land Company, a wholly owned subsidiary of Union Rock Company (Delaware) and Atlas Mixed Mortar Company.

While there was no written operating agreement covering the ownership and use of the properties of said Union Rock Land and Atlas, the treatment ac-

corded said companies and their assets was in all respects identical with that accorded the owning companies herein referred to.

In other words, all seven companies for all purposes were treated alike.

The conduct of the parties indicates that they intended to and did enter into a contract covering the ownership and use of properties of said Union Rock Land Company and Atlas Mixed Mortar Company substantially identical in terms with the written operating agreements with the other named "owning companies" dated July 15, 1929, and April 8, 1930, and heretofore referred to.

(12) Under date of February 16, 1933, Consolidated herein entered into an agreement with Union Rock Company (Delaware), Consumers Rock & Gravel Company, Inc. (Delaware), and Reliance Rock Company (Delaware), which agreement was termed a "Modification of Operating Agreement" [R. 124-130].

No similar agreement was ever entered into between Consolidated and Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Union Rock Land Company, or Atlas Mixed Mortar Company.

Said so-called modification agreement of February 16, 1933, provided in part:

(a) Depreciation (including depletion and amortization) was to be actually credited only upon the termination of the agreement. Its amount was then to be determined by appraisers



to be appointed by the contracting parties and was to be based on values and rates determined as of April 1, 1929, and each succeeding year during the life of the operating agreement.

(b) The term of said operating agreement was to be five years from February 16, 1933, except that:

“operating company is hereby given the option to extend said operating agreement as hereby modified for a further term of five years upon the same terms and conditions provided that notice of its intention to extend said term is given to each of the owning companies within one year of the date of expiration of the original term in this paragraph specified.”

No notice of an extension as heretofore referred to was ever given by Consolidated or any other person, nor was any agreement with respect thereto entered into.

(13) Said so-called “Modification of Operating Agreement” heretofore referred to was ignored for all purposes by all the parties thereto. No change of any kind or nature was made by any party to said agreement in the accounting procedure theretofore established and heretofore referred to. Consolidated continued to credit amounts representing depreciation, depletion and amortization of leaseholds monthly to each subsidiary exactly in accordance with the provisions of the original operating agreements.

When the five-year term provided for by said so-called “modification” expired, no appraisers were ap-

pointed and no effort was made to determine Consolidated's liability for depreciation as provided therein, and nothing has been done with respect thereto up to the present.

(14) The conduct of the parties to said modification of operating agreement of February 16, 1933, indicates that they intended to and did in fact immediately rescind said agreement by complete abandonment of its terms. Said agreement for the purpose of this proceeding never became operative.

(15) On May 24, 1935, petitions for the reorganization under Section 77B of the Bankruptcy Act, of Consolidated and its two subsidiaries, Union Rock Company (Delaware) and Consumers Rock & Gravel Company, Inc. (Delaware), were filed in the District Court of the United States for the Southern District of California, Central Division. By appropriate order Consolidated was temporarily continued in possession of the assets of all three corporations.

No petition involving receivership, bankruptcy or reorganization has ever been filed covering the remaining so-called "owning companies," namely, Builders Crushed Rock Products Company, Sunset Rock Products Company, Inc., Reliance Rock Company and Atlas Mixed Mortar Company, or Union Rock Land Company.

(16) Under date of July 2, 1935, the Court, by appropriate order, continued Consolidated in possession of all properties, including those of the two subsidiaries just named, Consumers and Union, until further order of the Court. No contrary order has been entered by the Court.

Said order of July 2, 1935, in substance authorized Consolidated to continue existing business and financial agreements, arrangements and relations between Consolidated and its subsidiaries "to the extent that they may be necessary or advisable in order that the properties of Consolidated and its subsidiary corporations may be operated as nearly as possible under the same policy of management." Said order of July 2, 1935, has remained in full force and effect.

(17) Upon the filing of the petition for reorganization heretofore referred to the books of account of Consolidated and said Union and Consumers companies were closed as if May 24, 1935, were the end of the fiscal year of said corporations. New accounts were thereupon set up beginning May 25, 1935.

Prior accounting practices were followed exactly with respect to all of said "owning companies." The current accounts of said owning companies and Consolidated were credited and debited monthly with amounts representing depreciation, depletion and amortization, all as heretofore set forth in detail.

The procedure just referred to has been followed consistently to the present. Statements duly filed with this Court show the operations of Consolidated have consistently reflected the procedure herein referred to. In so conducting its affairs Consolidated has complied with the provisions of the order of this Court of July 2, 1935, heretofore referred to.

(18) In its Federal Corporation Income and Excess-Profits Tax Return for the calendar year 1938 [R. 58] Consolidated, on line 22 thereof, deducted an item entitled "Expenses paid for subsidiaries—\$484,-

214.40.” Said amount included items totaling \$215,917.64, representing the amounts of depreciation, depletion and amortization sustained by the so-called “owning companies” with respect to their properties. The details with respect to said amount of \$484,214.40 appear on page 77 of the Record. Said amounts were computed and determined in accordance with the provisions of the various operating agreements dated July 15, 1929, and April 8, 1930, and were set up on the books of Consolidated as expenses of operation, and on the books of the owning companies as accounts receivable, all as heretofore herein set forth.

(19) The United States, the claimant herein, has disallowed as deductible expenses to Consolidated all of said \$215,917.64 being a part of said item of \$484,214.40 as set forth above, and adjusted Consolidated’s taxable income for the year 1938 accordingly. Based upon said adjustment, the United States, on November 28, 1941, assessed against Consolidated additional income taxes for the calendar year 1938 in the amount of \$25,112.72, plus interest thereon to November 28, 1941, in the amount of \$4,071.70.

(20) On March 9, 1942, this Court entered an order granting leave to the United States to file its claim in this proceeding for said alleged 1938 income tax deficiency together with interest thereon. Said claim was filed by the United States on March 27, 1942. Objections to the allowance of said claim either in whole or in part were duly filed by Consolidated.

(21) After the second hearing heretofore referred to under the caption of “Preliminary Statement” the



Trial Court made additional findings as to the correct amount of the disputed deductions as follows:

(a) The depreciation sustained by Consolidated's various subsidiary companies for the calendar year 1938 and which Consolidated is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$64,253.52.

(b) The depletion sustained by Consolidated's various subsidiary companies for the calendar year 1938 and which Consolidated is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$7,747.32.

(c) The amortization of leaseholds of Consolidated's various subsidiary companies for the calendar year 1938 and which Consolidated is entitled to deduct as an expense in determining its taxable net income for the calendar year 1938 is \$6,538.46.

(22) Based upon the facts as above set forth and the conclusions of law grounded thereon, the Trial Court approved a recomputation of Consolidated's income tax liability for the calendar year 1938 [R. 323-324] which showed a net taxable income of \$3,036.02 instead of \$152,266.30 originally determined by appellant. Of the difference between said two sums, which amounts to \$149,230.28, but \$78,539.30 is in controversy in this appeal. Said \$78,539.30 is made up of the three items referred to in paragraph 21(a), (b) and (c) above of this Statement of Facts.

### Contentions of the Parties.

1. Appellant contends that Consolidated may not deduct, in determining its 1938 income tax liability, the items totaling \$78,539.30 and heretofore referred to, because

(a) They represent capital contributions by Consolidated to its subsidiaries, and

(b) Because Consolidated was "currently denying liability" to its subsidiaries for said items and was therefore not entitled to deduct them in any event.

2. Appellees contend that Consolidated may deduct said items totaling \$78,539.30 in determining its 1938 Federal income tax liability because

(a) Said items were not contributions to the capital of Consolidated's subsidiaries but instead constituted rent or compensation due to said subsidiaries from Consolidated on account of the use by Consolidated in its business of properties owned by said subsidiaries; and

(b) Under the agreement of the parties said rent was measured by the normal operating charges incurred by said subsidiaries including interest on the subsidiaries' bonds, repairs required to be made to said subsidiaries' properties and the current depreciation, depletion and amortization sustained by said subsidiaries with respect to said properties;

(c) Further, there is not a shred of evidence in the Record to justify appellant's assertion that Consolidated was denying liability to its subsidiaries on account of said items. Instead, the Trial Court's findings are directly to the contrary.

Accordingly, appellant's suggestion that this Appellate Court find a fact contrary to the facts found by the Trial Court is unwarranted and improper.

(d) Finally, even if the Record justified a finding that the liability in question was being denied by Consolidated, said point was not presented to or passed upon by the Trial Court and accordingly may not be urged on appeal as a reason for reversing the judgment of the District Court.

### ARGUMENT.

Appellees' contentions just referred to will be discussed in the inverse order of their statement.

#### I.

**Appellant's Assertion That Consolidated Was "Currently Denying Liability" to Its Subsidiaries for the Amounts Here in Controversy Is Without Merit and May Not Be Urged or Considered Here.**

On pages 2 and 12 of its Brief appellant asserts without qualification that Consolidated was "currently denying" that it owed the amounts here in dispute to its subsidiaries.

To sustain this assertion of fact appellant refers not to the Record in this proceeding but to certain briefs filed with the Supreme Court of the United States in a cause entitled, *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 61 S. Ct. 675, decided March 3, 1941 (Br. p. 16). It also refers to certain statements made by Mr. Justice Douglas, who wrote the Court's opinion in said cause.

Admittedly the *DuBois* case had nothing whatever to do with the present income tax controversy. Instead, it was concerned only with the fairness of a plan of reorganization under Section 77B of the Federal Bankruptcy Act. Said cause was before the Supreme Court on petition to review a decision of this Court which in turn had reversed a judgment of the Trial Court (the Trial Court here) confirming said reorganization plan entered on or about *September 8, 1938*.

As heretofore stated, the Supreme Court was concerned only with the fairness of the plan of reorganization. In connection therewith, a dispute had arisen between the company's preferred stockholders and certain of its subsidiaries' bondholders. It was this controversy to which the briefs and the opinion of Mr. Justice Douglas referred. There is nothing in the Supreme Court's decision in the case heretofore referred to which indicates as a fact that on *December 31, 1938*, the end of the taxable year here in controversy, Consolidated was denying liability to its subsidiaries for the items here in dispute. As a matter of fact the Supreme Court in said proceeding of necessity had nothing before it subsequent to September 8, 1938, when the Trial Court confirmed the plan under attack. Hence, irrespective of all other considerations, *it cannot possibly be contended that at the close of its accounting year (admittedly the basic date) Consolidated was in fact denying liability for the items here in dispute.*

But, entirely apart from the point just made, appellant in its Brief has asked this Court to substitute for the Trial Court's express findings conflicting inferences of



fact drawn by another Court in an entirely different proceeding. In the instant cause the Trial Court found [R. 271]:

“\* \* \* The amount of these items appeared on the debtor’s books at the close of each month from the beginning to the present including each month of the year 1938 and at the close of the year 1938 as an *unqualified liability* to each subsidiary or owning company.

“The books of account of each owning company for the same period also showed said amounts representing depreciation, depletion and amortization of leaseholds *as a definite and unqualified account receivable and an asset due* from the debtor.” (Emphasis supplied.)

There was, of course, no express finding by the Trial Court that Consolidated *did not* deny liability for the items in question. This was obviously due to the fact the point was not even remotely raised or considered below.

However, every fact and circumstance connected with this proceeding indicates that the liabilities in question were definite and certain at the end of the year 1938.

In view of these facts and the definite finding just quoted, it is indeed surprising that the appellant would ask this Court not only to ignore the Trial Court’s findings, but to substitute therefor new and different findings based upon matters not within the Record in the current proceeding.

But, not only has appellant offended in the manner indicated; it has gone even further. It was never even remotely suggested while this proceeding was being considered below that there was any dispute as to Consolidated’s

liability to its subsidiaries. In addition, it was not suggested that had such a dispute existed such fact would as a matter of law have affected the outcome of this controversy in any respect.

In other words, the legal conclusion urged by appellant from the facts assumed by appellant was not presented to the Trial Court for its consideration nor did the Trial Court pass thereon. This is made abundantly clear by the Trial Court's memorandum of conclusions where it said [R. 263, 264]:

"The principal, if not the sole, ground upon which the government contends that the debtor was not entitled to take the deductions mentioned is that the amounts included therein constituted capital contributions from the debtor to its subsidiaries."

Despite the fact that the point now made was neither presented to nor passed upon by the Trial Court, the appellant nevertheless asks this Court to *reverse* the Trial Court because of the latter's failure to foresee appellant's present contentions.

It is too clear to require comment that appellant may do none of the things it here seeks to do. It is also clear that this Court may not consider the points so raised by appellant nor aid it in its attempt to depart from the record. *General Utilities and Operating Company v. Helvering*, 296 U. S. 200, 56 S. Ct. 185 (1935), is here squarely in point.

In that proceeding the taxpayer had declared a large dividend payable in the stock of another corporation. Immediately after the distribution of said dividend, the

taxpayer's stockholders sold the stock so received to a third party. Before the Board of Tax Appeals the Government alleged that the taxpayer derived income from the distribution to its stockholders. The Board decided this issue against the Government and upon appeal to the Circuit Court the Government urged there for the first time that the sale of the stock, although technically made by the taxpayer's stockholders after distribution, was in fact made by the taxpayer and that the profit therefrom should be taxed to it. The Circuit Court sustained the Government in this new contention and reversed the Board.

The Supreme Court, however, reversed the Circuit Court saying in part:

"The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning the facts and any other evidence properly are accommodated to issues adequately raised.

"Recently (April, 1935) this court pointed out: 'The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. \* \* \* The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. \* \* \* If the Board has failed to

make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. \* \* \* And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.'

"Here the court undertook to decide a question not properly raised. *Also it made an inference of fact directly in conflict with the stipulation of the parties* and the findings, for which we think the record affords no support whatever." (Emphasis supplied.)

In the case just cited the Government asked the Circuit Court to infer *from the four corners of the record before it* that the sale in question was in fact made by the taxpayer corporation and the Circuit Court made said finding. The Supreme Court found the Government's request improper and the Circuit Court's action erroneous.

In the instant case the Government seeks to go much further. It asks this Court to go entirely outside the record and to make a finding directly in conflict with the Trial Court's findings. It then asks this Court to reverse the Trial Court for not making a finding of fact nor reaching a conclusion of law which was never presented to said Trial Court in any way, shape or form. It seems too clear to require further comment that the appellant's request and action in this connection is improper and must be denied.



II.

**Consolidated Was Clearly Entitled to Deduct as Business Expenses in Determining Its Net Taxable Income for the Calendar Year 1938 the Items Here in Controversy.**

The issue here involved is really exceedingly simple.

As the Trial Court's findings of fact clearly show, for purposes of operating economy and efficiency Consolidated took over the physical properties of its various subsidiaries and used them in *its own business*. *It did not, as appellant suggests, operate the subsidiaries*. Consolidated was to retain as its own all the income accruing from the use of said properties. For said use Consolidated was to pay all the current operating expenses of said subsidiaries including interest on the subsidiaries' bonds, rentals which the subsidiaries were required to pay under separate leases, repairs to the subsidiaries' properties and the depreciation, depletion and amortization *currently* sustained by said subsidiaries with respect to said properties. In other words the measure of the amount which Consolidated was *currently* to pay said subsidiaries for the use of said properties was the sum of the items just referred to.

Consolidated reported on its 1938 tax return its gross income *from the use of its subsidiaries'* properties and treated as an expense chargeable against said income the amounts due its subsidiaries as set forth above. The deductibility of these amounts is the sole issue in this proceeding.

This simple issue was clearly understood by the Trial Court as is shown by the following observation appearing in its memorandum of conclusions [R. 262] :

"The question of law requiring determination involves the right of the debtor to take certain deduc-

tions in connection with its income tax return for the calendar year 1938. These deductions represent amounts which the debtor asserts it was obligated to pay to certain of its subsidiaries and that in accordance with the arrangements made between them such compensation or rent was measured by the amount of the depreciation, depletion and amortization currently accruing against said properties.”

Appellant in denying Consolidated's claim is demonstrably inconsistent. Of the item of \$484,214.40 deducted by Consolidated in its 1938 income tax return [R. 276] as “Expenses paid for subsidiaries” appellant allowed as deductions all but \$215,917.67, which figure represented the items of depreciation, depletion and amortization. In other words, the other items, including bond interest, rent, etc., which together with the three items just mentioned made up the *measure* of the compensation to be paid by Consolidated, were allowed and the other three items were disallowed. If the depreciation, depletion and amortization represented contributions to the subsidiaries' capital why should not the other items be so treated.

On the other hand, Consolidated and its subsidiaries have been entirely consistent in the treatment accorded said items. On page 77 of the Record is shown the detail of the total of \$484,214.40 deducted by Consolidated for the year 1938. Of this total \$222,249.98 is shown as the amount paid Consumers Rock & Gravel Company, Inc., for the use of its properties. This sum was included as income by Consumers in its 1938 income tax return [R. 174] just as ordinary rent would have been so included. In said return Consumers deducted its own depreciation, depletion and amortization. The same procedure was followed by all the other subsidiaries.

In other words, Consolidated at no time was attempting to deduct depreciation, depletion and amortization on properties belonging to other persons, instead it was merely seeking to deduct amounts paid for the use of property, *which amounts were measured by agreed items of which said depreciation, depletion and amortization were but a few.*

Appellant's contentions with respect to these items are especially surprising in view of the fact that for more than sixteen years the regulations of the Commissioner of Internal Revenue have expressly contemplated that rent or compensation for the use of property may be measured by standards other than specific and fixed sums of money. Section 19.22(a)-20 of the regulations issued under the Federal Internal Revenue Code in effect throughout the year 1938 provided in part:

"If a corporation has leased its property in consideration that the lessee shall pay in lieu of other rental an amount equivalent to a certain rate of dividend on the lessor's capital stock or the interest on the lessor's outstanding indebtedness *together with taxes, insurance or other fixed charges such payments shall be considered rental payments and shall be returned by the lessor corporation as income. \* \* \**" (Emphasis supplied.)

The above article of the regulations exactly fits the case at bar. What could be more reasonable than for the parties to agree that for the use by the parent of the subsidiaries' properties the items mentioned should be assumed and paid by the parent. As a matter of fact the agreement between the parties was an extraordinarily fair agreement. Under it the subsidiaries "broke even." Said subsidiaries

could have insisted that certain amounts in addition to the items mentioned should be paid for the use of said properties; in other words, that the subsidiaries should receive a profit. In such event the deduction to which Consolidated would have been entitled would be even greater than is here claimed. Had a fixed dollar consideration been agreed upon by the parties in advance for the use of said properties no question would have arisen and the Commissioner of Internal Revenue in fact would have allowed to Consolidated the amount claimed.

Thus viewed the issue which appellant has obscured becomes clear and the error of its contentions apparent.

Clearly none of the cases relied upon by appellant in its Brief are in point.

(a) On page 20 of its Brief, appellant cites the cases of *Majestic Securities Corp. v. Commissioner*, 120 F. (2d) 12, C. C. A. 8th (1941), and *Pennsylvania Indemnity Co. v. Commissioner*, 77 F. (2d) 92, C. C. A. 3rd (1935). In both of these cases securities were purchased from affiliated companies at more than their demonstrable market value and for the sole purpose of preserving the credit of the original owner. The Courts properly refused to permit the purchasers under such circumstances to claim losses based upon the amounts so paid for said securities. Obviously these cases have no bearing here.

(b) On page 20 of its Brief, the appellant cites *Cambridge Apartment Building Corp. v. Commissioner*, 44 B. T. A. 617 (1941), and states:

“The then Board of Tax Appeals denied that that portion of an assessment made against



stockholder-tenants of an apartment building used for the retirement of the assessor's bonds was income to the corporation."

With that ruling we, of course, have no quarrel. It obviously has no application here. The discharge of a bond is almost always a capital transaction. Here we are concerned only with current operating items such as interest on bonds, depreciation, depletion and amortization. Consolidated is not claiming as an item of rent any amounts required to discharge the bonds of its subsidiaries.

But, as a matter of fact, if the agreements between the parties had so provided and the total amounts which Consolidated would thus have had to pay were reasonable for the use of the properties, then even amounts so expended would be deductible. No useful purpose will be served, however, by entering into any such speculation here as the facts which form the background for the cases cited are not here present.

(c) The case of *Interstate Transit Lines v. Commissioner*, 130 F. (2d) 136, C. C. A. 8th (1942), affirmed by the Supreme Court 319 U. S. 590, 63 Sup. Ct. 1279 (1943), is likewise not in point.

In that case the parent used a portion of the subsidiaries' facilities in its interstate operations and paid an agreed rental therefor. The subsidiary, however, had intrastate operations of its own. The parent taxpayer had guaranteed the subsidiary against loss on account of all of its operations and claimed the amount of the loss so paid as a deduction against its other

income. The deduction was properly denied by both the Circuit and Supreme Courts.

The Circuit Court made the basis for the disallowance crystal clear when it said in part:

“Assuming that the subsidiary was an agent of the petitioner as a carrier of its interstate traffic in California the absorption contract obligating the petitioner to pay the subsidiary’s deficits does not *place the obligation upon the ground of payment for any service rendered or to be rendered by the subsidiary*. The amount of the deficit to be paid is not made dependent upon any corresponding unit of benefit to the petitioner or sacrifice of the subsidiary.” (Emphasis supplied.)

The Supreme Court approved this analysis by saying:

“As the Circuit Court pointed out, the assumption of the deficit was *not dependent upon a corresponding service or benefit rendered to the petitioner’s business*.” (Emphasis supplied.)

The language quoted demonstrates the inapplicability of the case in question to the instant proceeding. Here the amount to be paid by Consolidated bore the most direct possible kind of relationship to the benefit derived by Consolidated. Consolidated had the benefit of the use of the subsidiaries’ properties, retaining for its own all the income accruing on account of said use. What could be more reasonable than that it pay to said subsidiaries the depreciation, depletion and amortization sustained by the subsidiaries with respect to said properties.

Conclusion.

It is respectfully urged that the judgment of the District Court should be affirmed.

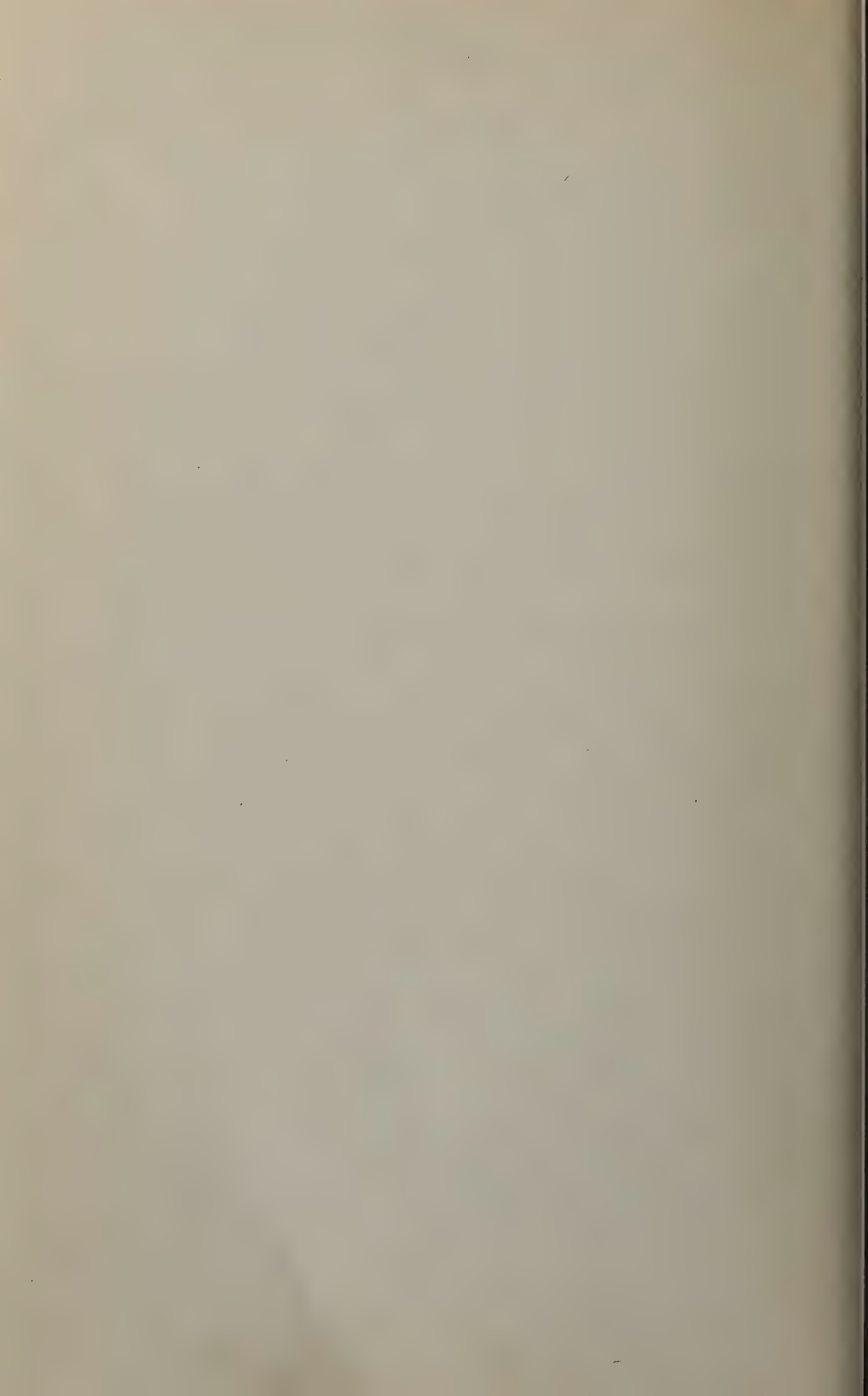
Respectfully submitted,

LATHAM & WATKINS,

By DANA LATHAM,

*Counsel for Appellees.*

January, 1945.





Nos. 10784-10785

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit.**

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**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**CONSOLIDATED ROCK PRODUCTS CO., A CORPORATION,  
UNION ROCK COMPANY, A CORPORATION, AND CON-  
SUMERS ROCK & GRAVEL COMPANY, INC., A CORPORA-  
TION, APPELLEES**

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**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

---

**REPLY BRIEF FOR THE UNITED STATES**

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**FILED**

**FEB 26 1944**

**PAUL P. O'BRIEN,**  
**CLERK**



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# In the United States Circuit Court of Appeals for the Ninth Circuit

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Nos. 10784-10785

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## ARGUMENT

The Government's argument that these items were not deduct-  
ible as fixed and determined liabilities of the tax year does  
not raise a new issue in this court. Nor is that argument  
founded upon any departure from or contradiction of the  
record or of the findings of the court below

Part I of appellees' argument (Br. 19-24) is  
devoted, not to any attempt at refutation of the Gov-  
ernment's statement that the taxpayer was currently  
insisting that it had no fixed and determined liability  
to its subsidiaries with respect to these items, nor to  
any effort to dispute the proposition that *only* fixed  
and determined liabilities may be deducted by a tax-

payer on the accrual basis; the appellees say merely that there is no evidence to support the Government's contention, and that in making the argument the Government is seeking at this late date to inject an entirely new issue into the case—which it may not do. We answer that the issue of whether these items were proper accruals of the taxable year<sup>1</sup> *was* presented to the court below; that the taxpayer has all along been apprised of our position; and that the Government's argument on the point has solid evidentiary foundation. Nor does that argument in anywise conflict with the trial court's findings.

It should be kept constantly in mind that the instant controversy has its setting in a reorganization proceeding involving the taxpayer corporation and two of the seven subsidiary corporations to which it *presently* alleges that it was unconditionally liable in 1938 for the amounts here in question; the tax claim which is the subject matter of this appeal was filed directly *in* the reorganization proceedings (R. 35) and was heard, considered, and denied, as a *part* of those proceedings (R. 282-285). The "record" in the case at bar is accordingly a part of the "record" of the reorganization; and the converse of the proposition is equally true. Furthermore, the Government expressly *made* the developments in the reorganization proceedings a part of its case. For example, in our brief filed

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<sup>1</sup> Assuming, *arguendo*, that they were "business expenses" of the parent corporation within the meaning of Section 23 (a). The discussion of the Government's contention that they were capital contributions to the subsidiaries and not "business expenses" of the parent comprises Part II of our opening brief.

below, we specifically called the attention of the court to its order continuing the debtor in possession of the properties and providing that the operating agreements should remain in effect.<sup>2</sup>

It will be recalled that the taxpayer had petitioned for reorganization in 1935; that in 1937, the year prior to the taxable year here concerned, the taxpayer had submitted a plan of reorganization to the court below; and that objections were filed thereto by certain bondholders of the two petitioning subsidiary corporations. These bondholders *inter alia* questioned the asset position of their debtor corporations as set forth in the plan, and were insistent that an appraisal be made. The taxpayer's answer in part was that by reason of the operating agreements, its properties and those of its subsidiaries had become so intermingled that segregation and separate appraisal was impossible; and the court below specifically found to that effect when it confirmed the plan in 1938.<sup>3</sup> See *Consolidated Rock Co. v. Du Bois*, 312 U. S. 510, 518. This finding by the trial court would seem affirmatively to support our position that the items here in question were not proper accruals of the year 1938.

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<sup>2</sup> We argued that neither the terms of the operating contracts nor anything in the court order showed these items to be unconditionally due in the taxable year. The pertinent excerpt from our brief in the trial court appears at a later point in this discussion.

<sup>3</sup> The court did not make any finding with respect to the amount or validity of the inter-company claims arising from the operating agreements; it concluded that any liability thereunder was not for the benefit of third persons, including the bondholders. The proceedings before the trial court in respect to the reorganization plan appear in *In Re Consolidated Rock Products Co. v. Union Rock Co.* (S. D. Cal.), No. 25,816-H.



In any event, it quite definitely contradicts the later conclusion and order of the trial court that these items were properly deductible by the debtor corporation. The reason, of course, is that if the assets of parent and subsidiaries<sup>4</sup> were so inextricably commingled as a result of the operating agreements as to defy segregation, then it was also impossible to ascertain what amount of depreciation, etc., if any, the property of the respective subsidiaries had suffered in the year 1938. Accordingly, bearing in mind the taxpayer's present contention that the amount of the subsidiaries' depreciation, etc., was a measurement of its so-called "rental" liability to them, it becomes at once apparent, we submit, that on this finding the taxpayer did not have any determined or determinable liability to its subsidiaries during the pertinent tax period.

However, we pass this point in order to consider the further course of these reorganization proceedings in the light of appellees' complaint that we are raising a new issue on this appeal, and an issue which not only goes beyond the evidence but actually contradicts the trial court's findings. The instant claim for taxes was filed in these reorganization proceedings in February of 1942; in 1940, this Court had reversed the District Court's confirmation of the plan of reorganization submitted by the taxpayer, the decision of reversal containing<sup>5</sup> the following significant paragraph:

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<sup>4</sup> Only two of the seven subsidiary corporations were involved in the reorganization proceedings. It is to be noted, however, that the taxpayer's position here is the same with respect to *all* of the subsidiaries. See R. 272.

<sup>5</sup> *In Re Consolidated Rock Products Co.*, 114 F. 2d 102, 104.



The debtor's books showed that it owed Union and Consumers about \$5,000,000, *the validity and amount of such debt being disputed by the debtor.* (Italics supplied.)

And, as we pointed out at some length in our opening brief (p. 16-18), the taxpayer continued to dispute the validity and amount of "such debt" when the Supreme Court took the case on certiorari and in 1941 upheld this Court's decision that the proposed plan should not have been approved. Thus, at the time of decision by the trial court in respect of the instant controversy, which was in June of 1943 (R. 262), the decision of this Court and of the Supreme Court as well as the taxpayer's briefs filed in support of its plan—all containing unambiguous evidence of the taxpayer's denial of obligation to its subsidiaries—were a part of the "record" in the reorganization case. Again, the taxpayer appears conveniently to forget that the tax claim at bar is not an isolated matter which can be insulated from the proceedings of which it is an integral part; the taxpayer would like to ignore, and to have this Court ignore, the fact that to the very court which heard the instant controversy and to two courts of review, the taxpayer had continuously urged that the operating agreements created not certainties but *uncertainties*. The taxpayer has not been misled; instead, we submit, it is the taxpayer who seemingly has sought and still seeks to mislead.

It may perhaps be true that the Government did not specifically argue below that the taxpayer was making an "about-face" with respect to the definite-

ness of these liabilities. The briefs filed in the trial court do not disclose that that particular argument was made in connection with the issue of whether these liabilities were definite and certain in fact and amount so as to be proper accruals of the taxable year. But although the taxpayer apparently perceives no distinction, there is certainly a vast difference, we submit, between making a new *argument* and raising a new issue in an appellate court. And the *issue* of the "certainty" of these liabilities clearly was presented to the District Court and was before it for consideration. The Government's brief below is ample proof that our case for disallowance of the deduction did not rest alone upon the contention that these items were not business expenses of the taxpayer within the meaning of Section 23 (a); our case was bottomed as well upon the assertion that even if the amounts *could* be so classified, they were not proper deductions of the year 1938 because they were not fixed and unconditional liabilities of that period. We quote from page 12 of the Government's brief below—

Furthermore, even assuming that the debtor may deduct the amounts as "Expenses", it is not clear that as of the taxable year in question, namely 1938, any "Expenses" of this category were incurred. The debtor reports its income for the taxable year upon the accrual basis. It may deduct "Expenses" only if they accrue, that is, as they unconditionally become due. There is nothing in the operating agreements or the modification of the operating agreements

or the court order<sup>6</sup> indicating that any obligation of the debtor as to depreciation became unconditionally due in 1938. \* \* \* The tenor of all three of these documents is that upon the termination of the operation of the subsidiaries by the debtor, then and at that time some arrangement may be reached as to the credit, if any, to be given the subsidiaries by the Operating Company on account of the depreciations of their property.<sup>7</sup> The debtor

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<sup>6</sup> This is the reference in our brief below to which we previously adverted in stating that the Government had specifically called the developments in the reorganization proceedings to the trial court's attention; which by implication at least pointed out that the taxpayer had made an "about face" with respect to the definiteness of the liabilities in question.

<sup>7</sup> It is interesting to note that although, in connection with its proposed reorganization plan, the taxpayer urged and the Supreme Court indicated in its *Du Bois* opinion, *supra*, that the modification agreement was in effect, the taxpayer in connection with the matter at bar urges and the District Court found (R. 274) that the modification agreement never became operative. While the point is not *per se* material, it further evidences not only the fact that the taxpayer follows that course which best serves its self-interest at the particular moment, but also it shows plainly the trial court's seemingly complete indifference here to the views of the two courts which had reviewed its previous decision.

And again: The taxpayer's instant brief to this Court is studded with denials (Br. 4, 25, 27) that it was "operating" the subsidiaries—such denials being in support of its present contention that the depreciation, etc., suffered by the subsidiaries was only a measurement of taxpayer's "rental" liability to them. But the Supreme Court's *Du Bois* opinion contains statements which can hardly be reconciled with these denials. Thus, at page 523 of the Supreme Court's opinion it is declared—

"There has been a unified operation of those several properties by Consolidated pursuant to the operating agreement. That operation not only resulted in extensive commingling of assets. All management functions of the several companies were assumed by Consolidated. The subsidiaries abdicated. Consolidated operated



is in a 77-B proceeding. All its agreements and actions are subject to the veto of the court. Unless and until the court issues an order as to depreciation, if any, to be allowed as a credit to the subsidiaries on account of the use of their properties by the debtor, no liability for depreciation arises on the part of the debtor. No such order was issued by the court during the taxable year. [Italics supplied.]

Moreover, the taxpayer in anticipation of the Government, declared in its opening brief below (p. 18)—

It is submitted that the real issue in this proceeding is whether or not at the end of 1938 the debtor has incurred *definite* liabilities to its subsidiaries for the use of their properties  
\* \* \*. [Italics supplied.]

Taxpayer's principle<sup>al</sup> argument on the point, as reflected in its brief to the trial court, was that liability was "definite" merely because the amounts here under consideration were set up on the taxpayer's books as an unconditional liability to pay and upon the subsidiaries' books as an unconditional right to receive. And it would appear that the trial court adopted this argument; in any event, it found, as the taxpayer points out (Br. 21), that the respective corporate book entries were made as "unqualified" accruals. But, of course, no citation of authority is needed to support the proposition that book entries must stand or fall on the truth of their content; they can rise no higher

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them as mere departments of its own business. Not even the formalities of separate corporate organizations were observed, except in minor particulars such as the maintenance of certain separate accounts."



than their source. If the items here in question were *not* liabilities which were definite and certain in the taxable year, "evidence" to the contrary appearing on the taxpayer's or on the subsidiaries' books of account will not make them what they were not. It is to be noted that the taxpayer in the case of *Dixie Pine Co. v. Commissioner*, 320 U. S. 516, which we cited in our brief in chief (p. 19) as dispositive of the issue now before this Court, was also "accruing" the amount of the state tax upon its books as an unqualified obligation—while vigorously contesting any liability to pay it. The Government does not, as the taxpayer urges (Br. 4), "contradict" the trial court's findings when it maintains here that the taxpayer could not deduct items on which it was denying liability—irrespective of the "unqualified" manner in which the amounts were posted. That is a totally irrelevant consideration under the circumstances of this case; the controlling factor here is that unless and until the taxpayer ceased to deny liability to its subsidiaries<sup>8</sup> or unless and until the matter was authoritatively adjudicated against it, the obligation was not fixed and determined within the meaning of the federal revenue laws. *Dixie Pine Co. v. Commissioner*, *supra*, and cases cited therein.

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<sup>8</sup> The taxpayer argues (Br. 20) that the Supreme Court in the *Du Bois* case "had nothing before it subsequent to September 8, 1938, when the Trial Court confirmed the plan under attack"; the taxpayer implies that between September 8th and the close of the taxable year, it might have *admitted* liability for aught that appears in the record. But we submit that when once the denial is shown, *proof* of cessation would certainly be required as foundation for a deduction claim.

And as we have shown, the Government has constantly maintained, from the very outset of this case, that the taxpayer's liability was *not* fixed and determined in 1938; the correctness of that assertion is, and always has been, one of the two legal questions or issues involved here. It is no "new issue" in the case. We are now doing no more than giving additional support to that assertion by *argument* that since the taxpayer was currently denying liability, there was every possibility that it would not, and therefore no "certainty" in 1938 that it ever would, pay its subsidiaries in any amount. The legal conclusion which we ask this Court to reach is precisely the same as we sought below: In the absence of "certainty" of obligation, deduction cannot be allowed.

We have amply demonstrated, we believe, that there is no attempt by the Government to introduce any issue in this Court which was not presented to or considered by<sup>9</sup> the court below. Nor do we make any contention before this Court with respect to matters of which the taxpayer is not already fully aware, or of which it has not been heretofore apprised with more than the "fair certainty" which it asks on authority of *General Utilities & Operating Co. v. Helvering*, 296

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<sup>9</sup> The taxpayer contends (R. 22) that the trial court's memorandum of conclusions shows that the "legal conclusion urged by" the Government was not presented or passed upon below. However, the paragraph of the memorandum to which the taxpayer refers states only (R. 263-264) that the *principal* contention made by the Government was that these items were capital contributions from parent to subsidiaries; by implication, this paragraph alone affirmatively shows that the Government had another ground for disallowance of the deduction claim.

U. S. 200.<sup>10</sup> We think that this Court will appreciate that the taxpayer at bar is really urging the proposition that a litigant can make on review only the identical *arguments* which it advanced in support of its case to the court of first instance; we believe that this Court will rightly refuse to consider any such "new issue" of procedural law.

Respectfully submitted.

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FEBRUARY, 1945.

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<sup>10</sup> See Paragraph III of "Statement of Points Upon Which Appellant Will Rely Upon Appeal From Order of October 30, 1943" which states (R. 288) :

The District Court erred in its Order of October 30, 1943, in failing to hold that no obligation on the part of the debtor, Consolidated Rock Products Company, to meet the depletion, depreciation or amortization of leaseholds sustained by the so-called owning companies had accrued during the taxable year 1938. And cf. *General Utilities & Operating Co. v. Helvering*, *supra*.

